No 75-1019



IN THE

# Supreme Court of the United States

October Term, 1975

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Appellants*

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Appellants.*

On Appeal From The State of New York Court of Appeals

## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

## OPINIONS BELOW

The opinion of the State of New York Court of Appeals (App. A.) is reported at 37 N.Y.2d 535, 337 N.E.2d 758, 375 N.Y.S.2d 308 (1975). The opinion of the Appellate Division of the Supreme Court of New York, First Department (App. B.) is reported at 45 App.Div.2d 356, 357 N.Y.S.2d 116 (1974). The memorandum decision of the Supreme Court, New York County, Special Term, is unreported, but appears as Appendix E.

## JURISDICTION

This suit was brought in the New York State courts to obtain a declaratory judgment that certain provisions of the New York State statute imposing a tax on the sale, transfer, and delivery of securities are unconstitutional and to enjoin enforcement on those provisions. The judgment of the State of New York Court of Appeals was entered on October 21, 1975. (App. A.) The Notice of Appeal was filed on December 9, 1975. (App. G.) The jurisdiction of the Supreme Court is conferred by 28 U.S.C. § 1257(2). *See, e.g., Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685 (1965); *American Oil Co. v. Neill,* 380 U.S. 451 (1965); *Western Turf Association v. Greenberg,* 204 U.S. 359 (1907); *cf. Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963); *Nippert v. Richmond,* 327 U.S. 416 (1946).

## QUESTION PRESENTED

Does a state tax on the sale, transfer of record ownership, and delivery of securities violate the commerce clause of the United States Constitution, art. 1, § 8, cl. 3, when its avowed legislative purpose and actual effect is to place out-of-state stock exchanges at a competitive disadvantage to in-state stock exchanges by subjecting transfers or deliveries following an out-of-state sale to heavier taxation than those following an in-state sale?

## STATUTE INVOLVED

Section 270-a of the New York Tax Law, chapter 827, section 4 of New York Laws of 1968, is set forth in Appendix F.

## STATEMENT OF THE CASE

### I. Proceedings Below

Plaintiffs-Appellants (hereinafter referred to as "plaintiffs") are six stock exchanges located outside the State



of New York. Defendants-Appellees (hereinafter referred to as "defendants") are the New York State Tax Commission and its members.

Plaintiffs filed suit in the Supreme Court, New York County, Special Term, for declaratory and injunctive relief alleging that section 270-a violates the United States Constitution, section 8 of article 1 (the commerce clause), section 2 of article 4 (the privileges and immunities clause), and section 1 of the fourteenth amendment (the equal protection clause).[1] Defendants' motion to dismiss was denied. Defendants appealed and the Appellate Division of the Supreme Court reversed. The Appellate Division held that plaintiffs had standing to challenge section 270-a but that the statute did not violate the United States Constitution.

On appeal to the State of New York Court of Appeals, plaintiffs argued only on the bases of the commerce clause and the equal protection clause of the fourteenth amendment. The Court of Appeals affirmed dismissal of the complaint, holding that the statute was not unconstitutional.[2] The trial court entered judgment dismissing the complaint pursuant to the order of the Appellate Division, as affirmed by the Court of Appeals. (App. D.)

On appeal in this Court, the plaintiffs rely solely on the commerce clause to establish the unconstitutionality of section 270-a.

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[1] No federal court had jurisdiction to grant the relief requested. 28 U.S.C. § 1341.

[2] The trial court and the Appellate Division held that plaintiffs have standing to bring this suit. This Court's decisions make the correctness of those holdings clear. *See, Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970). The Court of Appeals did not question plaintiffs standing, and, therefore, that issue is not addressed in this Jurisdictional Statement.

## II. The Issue

At issue in this case is the constitutionality of a 1968 amendment to the New York Tax Law. Laws of 1968, ch. 827, § 4. This amendment is now section 270-a of the Tax Law (hereinafter referred to as "section 270-a"). (App. F.)

Since 1905, New York State has imposed a tax (hereinafter referred to as the "transfer tax") on any sale or agreement to sell, or delivery or transfer of equity securities occurring in New York State. With respect to any particular transaction, if more than one of these incidents of taxation occurs within New York State, a tax is imposed on only one such incident.[3]

Prior to the effective date of section 270-a, *viz.*, July 1, 1969, the rate of tax under the transfer tax was based solely on the price of the securities involved. Accordingly, the amount of tax due on any particular transaction varied with the price and number of shares involved but was not affected by which or how many of the incidents of taxation occurred within the state. Section 270-a changed the transfer tax by establishing different tax rates keyed to whether the sale of securities preceding an in-state transfer or delivery occurred in-state or out-of-state.

Plaintiffs maintain trading facilities outside the State of New York for the purchase and sale of securities. Many transfers of record ownership and deliveries of securities following these sales take place within the State of New York. A large portion of the securities which may be purchased and sold on plaintiffs' exchanges also may be purchased and sold on stock exchanges located within the State of New York.

[3] Rules and Regulations under the New York Tax Law, Title 20, § 440.2.



By imposing a discriminatory tax on transfers and deliveries which follow a sale on plaintiffs' exchanges, section 270-a places plaintiffs at a disadvantage in competition with stock exchanges located in New York State. Plaintiffs challenge section 270-a on the ground that this discriminatory tax constitutes an undue burden on interstate commerce in violation of the commerce clause of the United States Constitution.

## THE QUESTION PRESENTED IS SUBSTANTIAL

### I. Section 270-a Of The New York Tax Law Is Unconstitutional Because Its Purpose And Effect Is To Discriminate Against Interstate Commerce By Putting Out-Of-State Stock Exchanges At A Competitive Disadvantage In Relation to In-State Exchanges.

It has long been established that the commerce clause of the United States Constitution is not only an express delegation of power to Congress, but also a prohibition on state taxing or regulatory enactments that place any undue burden on interstate commerce. *See, e.g., Guy v. Baltimore,* 100 U.S. 743 (1880); *Welton v. Missouri,* 91 U.S. 347 (1876). In one sense this case is unusual among cases arising under the commerce clause in that both the New York legislature and the Governor have baldly asserted that the purpose of the challenged statute is to discriminate against out-of-state businesses, *e.g.,* the plaintiff exchanges, in favor of in-state business, *i.e.,* the New York exchanges. (See pt. A, *infra.*) In *H. P. Hood & Sons v. DuMond,* 336 U.S. 525 (1949), this Court considered a somewhat analogous situation. At issue there was a New York statute which allowed a state administrator to refuse a license to an out-of-state merchant if the issuance of the license would "tend to a destructive competition." 336 U.S. at 528. This Court held that statute violated the commerce clause of the United States Constitution.

### A. The Discriminatory Purpose and Effect of Section 270-a.

The Legislative Findings in relation to section 270-a, § 1 of the Laws of 1968, ch. 827, read in part:

> The legislature hereby finds that: . . . In order to encourage the effecting by non-residents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by non-residents of the state of New York and a maximum tax for certain large block sales are desirable.

The Governor's Memorandum on Approval of Chapter 827 elaborates somewhat further on the purpose and intended effect of section 270-a, and includes the following:

> Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry to one of national and international scope. *While the bulk of stock transfer still funnels through New York,* only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State where more than 90 percent of trading is in securities listed on the New York Stock Exchange. *The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.*
>
> The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and *will provide long-term relief from some of the competitive pressures from outside the State.*[4]

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[4] 1968 Public Papers of Governor Rockefeller, pp. 552-54; 1968 McKinney's Session Laws of New York, Vol. 2, p. 2384. (Emphasis added.)



The avowed purpose of section 270-a is thus to divert transactions away from the plaintiff exchanges and to the stock exchanges located within New York State. As the opinion of the Appellate Division below stated:

> [I]ndeed a purpose of the 1969 amendment [section 270-a] was to discourage diversion of stock transactions from New York exchanges and to encourage transaction of securities in New York. 45 App.Div.2d 365, 357 N.Y.S.2d 116, 118-119.

The discrimination against out-of-state exchanges announced as the purpose of section 270-a is accomplished in the statute by granting two major types of tax advantages to taxable transactions (*i.e.,* sales, transfers or deliveries in New York) if, and only if, the particular taxable transaction involves an in-state sale as opposed to an out-of-state sale.[5] The first of these is a "maximum tax" of $350 in the case of a taxable transaction involving a sale made within New York State but not in the case of a taxable transaction involving an out-of-state sale. The second type of tax advantage is a 50% discount in the amount of tax due on taxable transactions of non-residents if they sell in New York State rather than outside of it.

The following examples illustrate the operation of the two discriminatory aspects of section 270-a:

#### Operation of "Maximum Tax"

X, a large investor, *e.g.,* a pension fund, wishes to sell 100,000 shares of ABC Company common stock.[6] (The residence of the investor is irrelevant.) If X sells on the New York Stock Exchange and transfers record owner-

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[5] A federal statute has recently become effective which limits the application of New York's transfer tax in certain situations, but which does not affect either the constitutional issue raised in this case or this Court's jurisdiction. Securities Acts Amendments of 1975, § 21(2), Pub.L.No. 94-29, § 21(2) (June 4, 1975). See Appendix G.

[6] For purposes of these examples and the subsequent graphs, it is assumed that the stock of ABC Company sells for more than $20 per share. Stock selling for less than $20 per share is subject to a lower rate of tax, but the discriminatory treatment of out-of-state

ship or effects delivery in New York, it pays only the "maximum" tax provided by Section 270-a—*i.e.*, $350. If, instead, it sells on one of the plaintiffs' exchanges and transfers record ownership or effects delivery in New York, it must pay the "regular" rate of $.05 per share without any "maximum", or a total of $5,000.

### Operation of "Non-Resident Discount"

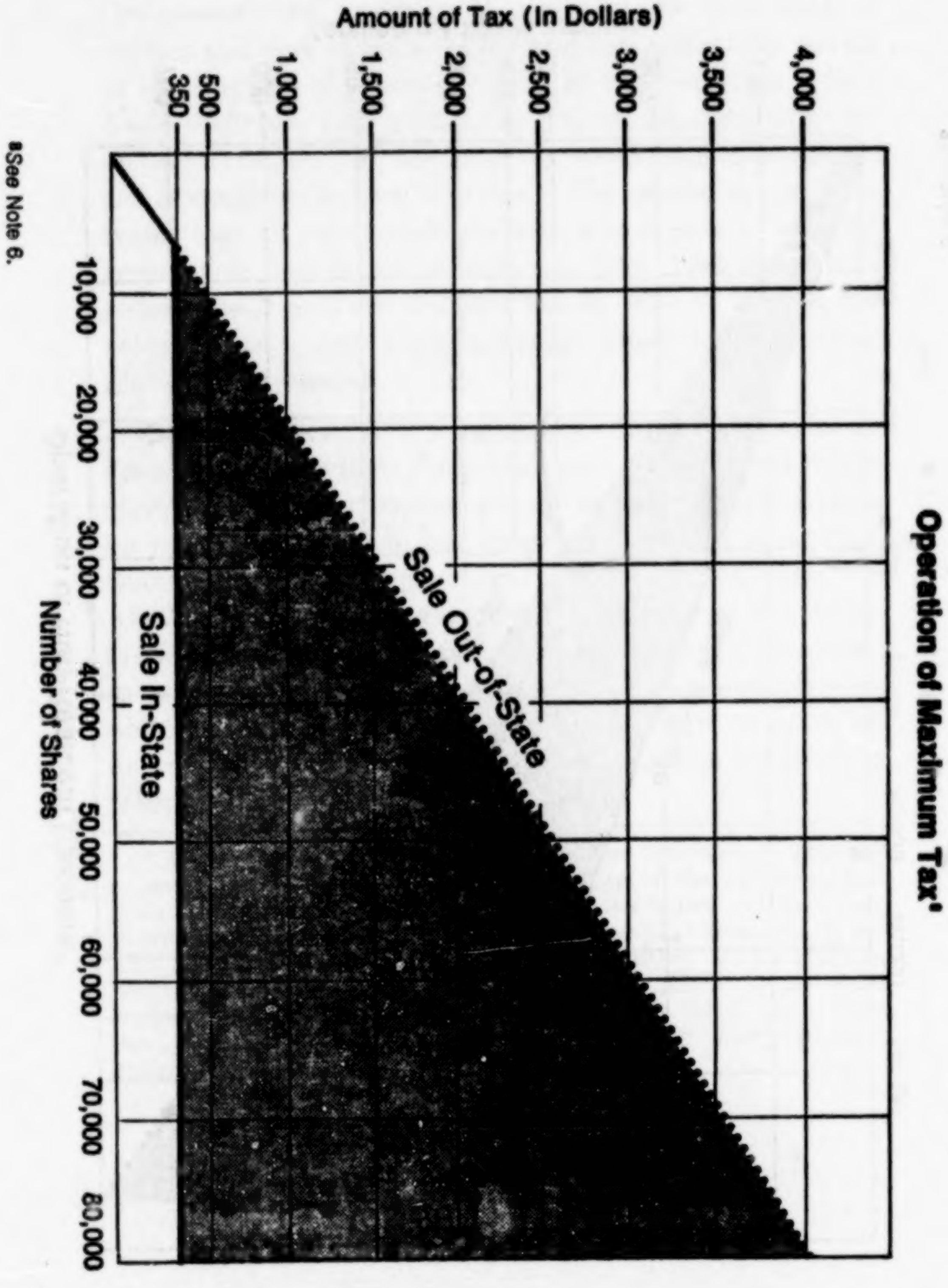
Y, a non-New York resident, wishes to sell 100 shares of ABC Company common stock.[7] If Y sells on one of the plaintiffs' exchanges and transfers record ownership or effects delivery in New York, he pays the "regular" rate of $.05 per share for a total tax of $5.00. If, on the other hand, Y sells on the New York Stock Exchange and transfers record ownership or effects delivery in New York, he pays a tax calculated at a rate of exactly half as much, *i.e.*, $.025 per share, for a total tax of $2.50. In the latter case, Y pays half as much tax not because he is a non-resident, but because he made the sale within New York State rather than outside it.

The graphs on the next pages illustrate both the absolute impact of the unequal treatment created by the "maximum tax" and the relative significance of the discrimination inherent in the "non-resident discount". In the graphs (which are on different scales reflecting different ranges of impact of the two separate discriminatory provisions), taxable transactions involving an in-state sale are represented by the solid lines; taxable transactions involving an out-of-state sale are represented by the broken lines. The shaded areas represent the difference in the amount of tax that must be paid on the same taxable transaction depending upon whether the sale is accomplished in New York or outside of New York.

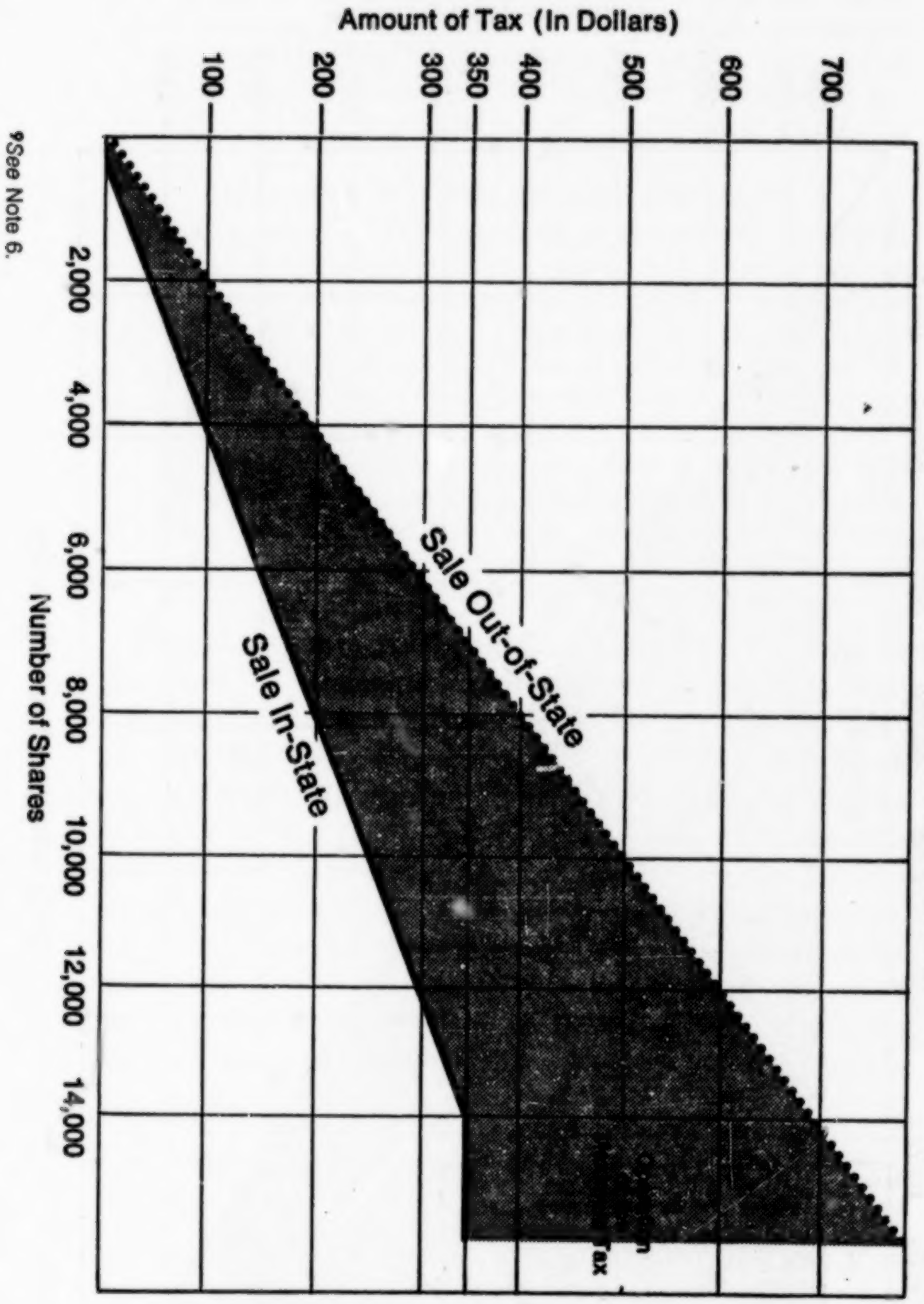
[6] **(Continued)**
sales illustrated by the two examples is not affected by the lower basic rate. In addition, no provision is made in the examples or the graphs for the 25% "tax surcharge" on all taxes computed under § 270 and § 270-a which became effective July 8, 1975. New York Tax Law, Art. 12, § 270-d.

[7] *See* note 6 *supra*.






[8] See Note 6.




**Operation of Non-Resident Discount**[9]

[9] See Note 6.



The first graph demonstrates that the benefit of the "maximum" tax provision is measured in thousands of dollars and thus offers a substantial inducement for sellers of large blocks of securities to effect their sales on a New York exchange rather than on one of the plaintiffs' exchanges even though the price at which they are able to sell is equal in the two locations.[10] The second graph illustrates that an out-of-state resident who wishes to or must transfer or deliver his securities in New York State may reduce the New York transfer tax by 50% if he sells his securities on a New York exchange rather than on one of plaintiffs' exchanges.

Clearly, section 270-a is designed to divert business away from plaintiffs to their competitor exchanges located within New York State by imposing materially different tax rates on persons engaged in one type of activity in New York State, *i.e.*, transferring or delivering securities, based on whether they have also engaged in another type of activity in New York State, *i.e.*, selling those securities. The commerce clause of the United States Constitution forbids such an obvious and continuing effort of one state to establish an economic barrier via its tax laws against competition from services offered in other states.

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[10] An increasing percentage of all securities trading is in "blocks" of securities large enough to take advantage of the maximum tax. Institutional Investor Study Report of the Securities and Exchange Commission, H.R. Doc. No. 92-64, 92d Cong., 1st Sess., pt. 4, ch. XI (1971). Sales of securities in blocks of 10,000 shares or more comprised approximately 17% of the trading volume in securities traded on the New York Stock Exchange in 1975. New York Stock Exchange Research Department Newsletter, "Large Blocks", January 2, 1976.

**B. The Unconstitutionality of Section 270-a.**

However unique section 270-a may be in the candid statement of its intent, the discriminatory operation of the statute is in the classic mold of state taxing schemes designed to protect parochial state economic interests against out-of-state competition. This Court has consistently held that such statutes violate the commerce clause. *See, e.g., Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963); *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389 (1952); *Nippert v. Richmond,* 327 U.S. 416 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940); *Robbins v. Taxing District,* 120 U.S. 489 (1887); *Guy v. Baltimore,* 100 U.S. 743 (1880); *Welton v. Missouri,* 91 U.S. 347 (1876). *See also, Robert Emmet & Son Oil & Supply Co. v. Sullivan,* 158 Conn. 234, 259 A.2d 636 (1969); *cf. Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951); *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); *Johnson v. Haydel,* 278 U.S. 16 (1928).

The facts of *Halliburton, supra,* present an instructive analogy to this case. The issue before the Court in *Halliburton* was whether a Louisiana sales and use tax scheme violated the commerce clause by reason of imposing a greater tax burden on persons using equipment in Louisiana that they had manufactured outside of Louisiana than on persons using equipment in Louisiana that they had manufactured in Louisiana. As in the present case, the statute challenged imposed different tax burdens on one type of activity (there, the use; here, the transfer or delivery) depending on whether another, related type of activity had been done in-state (there, the manufacture; here, the sale).[11] In concluding that the Louisiana tax was prohibited by the commerce clause, this Court stated:



> If Louisiana were the only state to impose an additional tax burden for such out-of-state operations, the disparate treatment would be an incentive to locate within Louisiana; it would tend "to neutralize advantages belonging to the place of origin." *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 527 . . . . Disapproval of such a result is implicit in all cases dealing with tax discrimination, since a tax which is "discriminatory in favor of the local merchant," *Nippert v. Richmond,* 327 U.S. 416 . . . also encourages an out-of-state operator to become a resident in order to compete on equal terms. If similar unequal tax structures were adopted in other States, a not unlikely result of affirming here, the effects would be more widespread . . . . Clearly, approval of the Louisiana use tax in this case would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co. v. Madison,* 340 U.S. 349, 356 . . . . 373 U.S. at 72, 73 (footnotes omitted).

The parallel between this case and *Welton v. Missouri, supra,* decided exactly 100 years ago, is also striking. In *Welton,* this Court held unconstitutional a Missouri statute that required peddlers who sold merchandise which *was not* "the growth, produce, or manufacture of the State" to obtain a license. No license was required of peddlers who sold merchandise which *was* "the growth, produce, or manufacture of the State". In the present case, the New York transfer tax imposes a higher tax burden on transfers of record ownership or deliveries if the transfer or de-

[11] The Court of Appeals opinion brushes aside the precedential impact of *Halliburton* on this case by saying that the issue of whether a sale in-state by a nonresident loses "its interstate character" was "neither argued nor decided" in *Halliburton.* 337 N.E.2d at 763, 375 N.Y.S.2d at 315. This issue is, in fact, irrelevant to this this case; *see* pt. II.A. *infra.*

livery is the result of a sale made in another state rather than a sale "made within this state".[12] The words of this Court in *Welton* should control the result in this case:

> [T]he commercial power [of the Federal Government over a commodity] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. 91 U.S. at 350.

**II. The State Of New York Court Of Appeals Erred In Its Judgment Regarding The Validity Of Section 270-a Under The Commerce Clause Of The United States Constitution.**

**A. The Court of Appeals Incorrectly Viewed the Statute as Merely Discriminating Between Two Types of "Interstate Commerce" Rather Than Between Out-of-State Businesses and In-State Businesses.**

In what can only be called a novel approach to the commerce clause, the Court of Appeals characterized taxable transactions involving an in-state sale and taxable transactions involving an out-of-state sale as both being "interstate commerce" if the seller in both situations is a non-resident. It then proceeded to conclude that because no "intrastate commerce" was involved, the competitive disadvantage at which section 270-a placed plaintiffs in relation to in-state exchanges was merely the result of discrimination between various types of "interstate" transactions and thus not prohibited by the commerce clause.[13] In so holding, the

[12] New York Tax Law, Art. 12, § 270-a (1) and (2).

[13] 337 N.E.2d at 762-63; 375 N.Y.S.2d at 314-15. The only authority cited for this theory, *Freeman v. Hewit*, 329 U.S. 249 (1946), is a case which deals only with the jurisdiction of a state to tax an "interstate sale" (holding that such sales could *not* be taxed). That issue is not presented here because plaintiffs have never contested that New York has the authority to tax the transfer, delivery and sale of securities which occur in-state.



**court chose to ignore the ". . . doctrine . . . that the practical operation of the tax, actual or potential, rather than its descriptive label or formal character is determinative." *Nippert v. Richmond*, 327 U.S. at 424, n. 9.**

**The central fact in the present case, which the court below refused to confront, is that section 270-a in its stated purpose and practical operation is "discriminatory in favor of the local merchant as against the out-of-state one". *Nippert v. Richmond*, 327 U.S. at 431. *That* is the discrimination against interstate commerce that plaintiffs challenge in this case. The New York tax is imposed on all transfers and deliveries of securities within New York but different rates are applied depending upon whether the preceding sale of the securities occurred in-state or out-of-state. Out-of-state sales lead to a higher tax than in-state sales, thus discriminating against plaintiffs' exchanges in favor of New York exchanges. The stated intent of this discrimination is to "provide long-term relief [for the New York exchanges] from some of the competitive pressures from outside the State." (Governor's Memorandum, *supra* note 4.)**

**Although the Court of Appeals refused to recognize that this discrimination was even governed by the commerce clause, this Court has made clear that a fundamental purpose of the commerce clause is to prohibit a state from using its taxing authority to ". . . build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 743, 746 (1880).**

**B. The Court of Appeals Erred in Upholding the "Maximum Tax" as Applied to Sales of Securities by New York Residents by Assuming That Its Inherent Discrimination "Should Have Little Or No 'Practical' Effect".**

**Under section 270-a if an institutional investor that is a New York resident sells a block of securities in-state, it**

pays the $350 "maximum tax", but if it sells that same block on one of plaintiff exchanges and transfers or receives delivery in New York, it must pay the unlimited percentage rate. The Court of Appeals was forced to deal separately with this situation because even in its incorrect approach to the commerce clause (*see* pp. 14-15 *supra*) when an out-of-state transaction by a resident is taxed more heavily than an in-state transaction by a resident, there has been a discrimination against interstate commerce. Rather than holding this discrimination a violation of the commerce clause, however, the Court of Appeals dismissed the issue with the statement that because a New York resident "is more than likely" to sell securities on a New York exchange, section 270-a ". . . should have little or no 'practical' effect on such transactions." 337 N.E.2d at 762, 375 N.Y.S.2d at 314.

This assumption is incorrect, without support in the record, and contrary to the legislative history of section 270-a. Large institutional investors doing a national and international business (those most likely to execute the large block transactions affected by the maximum tax) are unlikely to transact their business on a local exchange merely because of geographic proximity. Their choice of a stock exchange—assuming no tax discrimination—will be based on the best available services and prices. At the very least, this is a factual question which should not have been resolved against plaintiffs on a motion to dismiss. *Cf., Ingraham v. Maurer,* 39 App.Div.2d 258, 334 N.Y.S.2d 19 (1972); *Levien v. Board of Zoning and Appeals,* 313 N.Y.S. 2d 909 (Sup. Ct. 1970).

Moreover, as long as the discriminatory tax exists making it more expensive for New York residents to do business out-of-state than in-state, access to alternative securities markets by those New York residents who are dissatisfied



with the services and prices offered by New York exchanges will be inhibited.[14] The assurance of such access rather than speculation about the "practical effect" of discriminatory tax schemes is at the heart of the commerce clause. As this Court stated in *H. P. Hood & Sons v. DuMond,* 336 U.S. 525 (1948):

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. 336 U.S. at 539. (Emphasis added.)

### C. The Court of Appeals Erred in Justifying Section 270-a As "Compensatory Legislation" And In Analogizing It To A Valid Use Tax.

The Court of Appeals attempted to justify section 270-a on the ground that it is "compensatory legislation" designed to "neutralize" the "economic advantage" enjoyed by out-of-state exchanges because the sales on those exchanges are not taxed. 337 N.E.2d at 762, 375 N.Y.S. 2d at 314. This is not, however, a justification for section 270-a but the basis of its unconstitutionality. For as this Court has made clear, such an ". . . attempt to neutralize economic advantages belonging to the place of origin" is

[14] Congress has recognized that "[i]t is in the public interest and appropriate for the protection of investors . . . to assure . . . fair competition . . . among exchange markets. . . ." Securities Exchange Act of 1934, § 11A(a)(1)(C)(ii), 15 U.S.C. § 78q-1(a)(1)(C)(ii).

prohibited by the commerce clause of the Constitution. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935).

In *Baldwin*, this Court was presented with an attempt to justify another New York statute on essentially the same grounds as those used by the Court of Appeals in this case. The plaintiff in *Baldwin* purchased milk from producers in Vermont and attempted to resell it to customers in New York State. Because New York set minimum prices to be paid in-state producers, plaintiff could buy milk from Vermont producers at lower prices than his competitors could buy from New York producers. In an effort to "neutralize" this "economic advantage" of Vermont producers, New York prohibited the sale of milk to customers in New York State if the milk had been purchased from out-of-state producers for less than the minimum price set by the state.

In rejecting New York's rationale for this prohibition, Justice Cardozo, for this Court, stated:

> Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. . . . The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended. 294 U.S. at 527.

As New York could not protect its farmers by "neutralizing" the advantage Vermont's farmers enjoyed by not being subject to New York's fixed minimum prices, it cannot pro-



tect its stock exchanges by "neutralizing" the advantage out-of-state exchanges enjoy by not having their sales subject to New York's tax. Without the discriminatory tax it may be to a seller's economic advantage to sell his securities on an exchange located outside of New York State rather than on one located in the state. But if he must or wishes to transfer or deliver those securities in New York ("import" the securities into the state in the *Baldwin* context), he not only loses the economic advantage of selling on an out-of-state exchange but also is put at an economic disadvantage in comparison to a seller on an in-state exchange. Thus under section 270-a, a seller of securities on one of plaintiffs' exchanges is in effect subjected to an "impost" or "customs duty" which New York has ". . . framed for the very purpose of suppressing competition from without [the state]." 294 U.S. at 527. Therefore, rather than providing a justification for section 270-a, the fact that the statute represents an effort to "neutralize" the economic advantages enjoyed by out-of-state exchanges renders it invalid under the commerce clause.

The Court of Appeals suggests, nevertheless, that section 270-a is analogous to a "use tax" and can be justified on that basis. 337 N.E.2d at 762, 375 N.Y.S.2d at 314. In this reasoning, however, the court below was in error because section 270-a does not result in equal tax burdens for in-state and out-of-state sellers, which is the "strict rule" applied by this Court to determine the validity of compensatory use taxes. *See Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

*Halliburton Oil Well Co. v. Reily, supra*, is directly on point with respect to the validity of section 270-a as a compensating tax. In *Halliburton* a greater tax was imposed on persons using equipment in Louisiana that they had

manufactured out-of-state than on persons using equipment in Louisiana that they had manufactured in-state. In the instant case, a greater tax is imposed on persons transferring or delivering securities in New York that they have sold out-of-state than on persons transferring or delivering securities in New York that they have sold in-state. In evaluating the tax in *Halliburton*, this Court stated:

> The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state. 373 U.S. at 70.

The tax in *Halliburton* was struck down for violating this "strict rule of equality." 272 U.S. at 73. Section 270-a is invalid for the same reason.

The only relevant authority cited by the Court of Appeals in support of its view is *Alaska v. Artic Maid*, 366 U.S. 199 (1961).[15] In that case, Alaska imposed an "occupation" tax on "freezer ships" obtaining fish in Alaska's territorial waters and transporting them to out-of-state canneries. Alaska canners were the competitors of these "freezer ships". This Court held the tax valid because it did not involve any ". . . discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the . . . tax on the local canners." 366 U.S. at 204. In the instant case, however, the New York tax on a transfer or delivery following an out-of-state sale *does exceed* the tax imposed on comparable transactions involving an in-state sale. Thus rather than supporting section 270-a, *Artic Maid* points to

[15] The Court of Appeals also cited *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954). The issue in that case, however, was not the validity of a compensating use tax, but rather the right of a state imposing a use tax to force an out-of-state merchant to collect the tax from a vendee who was a resident of the taxing state.



its invalidity under the commerce clause because of the discrimination in favor of in-state exchanges and against out-of-state exchanges.

## CONCLUSION

The question presented by this appeal is substantial because of the significant burden on interstate commerce imposed by the discriminatory aspects of the New York transfer tax and the conflict of the State of New York Court of Appeal's decision with the decisions of this Court. As this Court said in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. at 522:

> If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

As New York could not protect its farmers in a manner that violated the commerce clause, it cannot protect its stock exchanges. For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,
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## Appendix A

### Opinion and Decision of the State of New York Court of Appeals

BOSTON STOCK EXCHANGE, et. al.
*Appellants*
v.
STATE TAX COMMISSION, et. al.
*Respondents*

October 21, 1975

Roger Pascal, Chicago, Ill., of the Illinois Bar, admitted pro hac vice, Milton H. Cohen and Allan Horwich, Chicago, Ill., for appellants.

Louis J. Lefkowitz, Atty. Gen. (Robert W. Bush and Ruth Kessler Toch, Albany, of counsel), for respondents.

Adrian P. Burke, Corp. Counsel, New York City (Samuel J. Warms and Robert J. Metzler, II, New York City, of counsel), for the City of New York, amicus curiae.

WACHTLER, Judge.

Since the turn of the century this State has levied a stock transfer tax (Tax Law, § 270). Recently the law was amended to reduce the tax on sales by nonresidents and to fix a maximum tax on all bulk sales within the State (Tax Law, § 270-a). The appellants, all of whom are stock exchanges located outside New York, seek a judgment declaring section 270-a unconstitutional on the grounds that it denies them equal protection of the laws, and discriminates against interstate commerce in violation of the commerce clause (U.S.Const. art. I, § 8).[1]

[1] In the lower courts appellants also argued that the statute violated the privileges and immunities clause (U.S. Const. art. IV, § 2), but that contention has been abandoned on this appeal.

At Special Term the defendant tax commission unsuccessfully argued that the State courts lacked subject matter jurisdiction, that the appellants lacked standing and that the complaint failed to state a cause of action. The Appellate Division modified, agreeing that the courts had subject matter jurisdiction and that the appellants had the requisite standing to raise the issues but found that the statute did not violate the Constitution as alleged. Accordingly they dismissed the complaint on the merits (45 A.D.2d 365, 357 N.Y.S.2d 116). The order of the Appellate Division should be affirmed.

Section 270 of the Tax Law imposes a tax "on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock". The tax depends on the value of the stock, the maximum tax being 5 cents per share. When the sale is made within the State, the tax may be levied on any of these events, but no more than one of them (20 NYCRR 440.2). When the sale and all the accompanying negotiations occur outside the State—as on one of the appellants' exchanges—no tax is due unless the stock is transferred in New York by a local transfer agent or upon the corporate books (see, e. g., *Matter of Monarch Life Ins. Co. v. State Tax Comm.,* 32 N.Y.2d 850, 346 N.Y.S.2d 272, 299 N.E.2d 684).

The constitutionality of this statute, originally enacted in 1905, has been sustained on several occasions against claims that it violated due process, equal protection (*Hatch v. Reardon,* 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415) and the commerce clause (*O'Kane v. State of New York,* 283 N.Y. 439, 28 N.E.2d 905; cf. *Hatch v. Reardon, supra*). It is now well settled that the commerce clause does not prohibit the States from levying a tax on the transfer of property within the State (*International Harvester Co. v. Department of Treasury,* 322 U.S. 340, 348, 64 S.Ct. 1019, 88 L.Ed.





1313; cf. *Freeman v. Hewit,* 329 U.S. 249, 258, 67 S.Ct. 274, 91 L.Ed. 265). Thus far the parties are agreed—the basic tax is constitutionally valid.

In 1966 complaints reached the Legislature that the transfer tax was driving business from the State. Specifically the New York exchanges complained that although brokers in other States charged the same commissions, transactions on the New York exchanges were placed at a disadvantage because none of the States in which the competing exchanges were located imposed a tax on stock sales or transfers. After extensive investigation the Legislature found that "the tax on transfers * * * is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable" (L.1968, ch. 827). Accordingly the Legislature amended the tax law, adding section 270-a, which reduces the tax by 50% when a nonresident sells stock within the State. And when any shareholder, resident or nonresident, sells a large block of stock within the State, the tax due is limited to a maximum of $350.[2]

[2] These are the rates which are presently applicable. When section 270-a originally went into effect on July 1, 1969, it provided for higher rates—95% for nonresidents, and a maximum tax of $2,500. This was gradually reduced to the current rates which became effective July 1, 1973.

If section 270-a is invalidated, the prior tax scheme would again become effective (L.1968, ch. 827, § 11) and the appellants would be restored to their position of economic superiority.

First we consider the appellants' argument that the statute violates the equal protection clause "because it establishes an arbitrary classification dependent upon the place of sale." The equal protection clause is often invoked in support of a claim that a State taxing scheme is arbitrary. This is a familiar argument and the general principles are well settled.

It has been repeatedly held that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (*Madden v. Kentucky,* 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590) and that the equal protection "clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation" (*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526, 527, 79 S.Ct. 437, 440, 3 L.Ed.2d 480). To succeed on the equal protection argument, the appellants must not only overcome the presumption of constitutionality which attaches to every statute (*Madden v. Kentucky,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590, *supra*) but must also establish that there is no "conceivable state of facts which would support" the classification (*Carmichael v. Southern Coal Co.,* 301 U.S. 495 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245; *Lawrence v. State Tax Comm.,* 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102; *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351). The burden is on the one challenging the statute "to negative every conceivable basis which might support it" (*Madden v. Kentucky, supra,* 309 U.S. at p. 88, 60 S.Ct. at p. 408).





Initially we note, as did the Appellate Division, that the place of sale is not always the determining factor under the statute in question. If a small sale is involved the full tax must be paid unless the seller is a nonresident. Thus the statute also distinguishes between residents and nonresidents in favor of the latter. The avowed purpose, as the legislative history indicates, was to encourage nonresidents to sell on the New York exchanges. Similar legislation has been consistently upheld "and [it] appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment" (*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 528, 79 S.Ct. 437, 441, 3 L. Ed.2d 480).

The Appellate Division also found that the distinction between in-State and out-of-State sales could be justified on the ground that "[t]ransactions made in New York are less susceptible to tax evasion than those made outside" (45 A.D.2d p. 369, 357 N.Y.S.2d p. 120). They found that *Madden v. Kentucky (supra)* supported this conclusion and we agree. In that case the State imposed an *ad valorem* tax of 10 cents per $100 on deposits in local banks, but taxed deposits in out-of-State banks at 50 cents per $100. Although the amount of tax was based on an out-of-State event, the court found that the classification was not arbitrary within the meaning of the equal protection clause since "The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection" (*Madden,* 309 U.S. 83, 90, 60 S.Ct. 406, 409, 84 L.Ed. 590, *supra*).

Here, of course, the Legislature noted that tax evasion was one of the factors which prompted the enactment of section 270-a. But even if their motives had been more subtly stated, or completely unstated, the fact remains that this is a conceivable basis for the distinction. The Legislature, of course, is not required to "record a complete catalogue of the considerations which move its members to enact laws" (*Carmichael,* 301 U.S. 495, 510, 57 S.Ct. 868, 872, 81 L.Ed. 1245, *supra*; see, also, *Lehnhausen,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351, *supra*).

Finally the appellants argue that the distinction between sales made within the State and sales completed elsewhere discriminates against interstate commerce. The commerce clause, of course, imposes additional limitations on the States' taxing powers and "restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax" (*Toomer v. Witsell,* 334 U.S. 385, 406, 68 S.Ct. 1156, 1167, 92 L.Ed. 1460). The question in other words is no longer whether the distinction can be justified by "any conceivable state of facts which could support it" (*Carmichael, supra,* 301 U.S. at p. 509, 57 S.Ct. at p. 872). "The guiding principle which limits the power of the States to tax is that the several States of the Union may not discriminate against interstate commerce in favor of intrastate commerce." (*O'Kane v. State of New York,* 283 N.Y. 439, 446, 28 N.E.2d 905, 908, *supra*; see, also, *Robbins v. Shelby County Taxing Dist.,* 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694; *Welton v. Missouri,* 91 U.S. 275, 23 L.Ed. 347; *Memphis Steam Laundry v. Stone,* 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436; *Nippert v. Richmond,* 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760; *Best & Co. v. Maxwell,* 311 U.S. 454, 61 S.Ct. 334, 85





L.Ed. 275; *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202.)

Here, as indicated, the Legislature found that the tax as originally enacted had the reverse effect in that it conferred an economic advantage on exchanges located outside the State. The appellants do not dispute this. To neutralize this advantage, the Legislature enacted section 270-a and it seems clear that they had the power to do so. A use tax is a familiar example of this type of compensatory legislation and it is well settled that it does not offend the commerce clause (see, e. g., *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 343, 74 S.Ct. 535, 98 L.Ed. 744; cf. *Alaska v. Arctic Maid,* 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227). Thus the stated legislative goal is a valid one.

Although helpful, this is not necessarily controlling for the determinative question in each case is "whether the statute under attack * * * will in its practical operation work discrimination against interstate commerce" (*Best & Co. v. Maxwell,* 311 U.S. 454, 456, 61 S.Ct. 334, 335, 85 L.Ed. 275, *supra*).

The statute should have no practical effect whatsoever on sales by shareholders, both residents and nonresidents, involving stocks which do not have to be transferred in New York. If they sell on a New York exchange, of course they can claim the benefit of section 270-a. But if they sell on one of the appellants' exchanges, they would pay no tax at all. Here the stock transfer law still works to the appellants' economic advantage.

The sale of New York securities poses a different problem. Then the transfer tax must be paid and the amount due depends on whether the sale is made in New York or elsewhere. In the case of New York residents it is more

than likely (cf. *Nippert v. Richmond,* 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760) that the sale would be made on a New York exchange in any event, so that section 270-a should have little or no "practical" effect on such transactions.

The appellants' major argument then is that section 270-a discriminates against interstate commerce by encouraging nonresidents to sell New York securities on New York exchanges. This assumes that such sales would be intrastate so that the practical effect of the statute would be to "discriminate against interstate commerce in favor of intrastate commerce" (*O'Kane,* 283 N.Y. 439, 446, 28 N.E.2d 905, 908, *supra*).

The sale of intangibles is, of course, commerce within the meaning of the commerce clause (*Freeman v. Hewit,* 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265). And we can assume that sales of New York stocks by a nonresident on an out-of-State exchange would nevertheless involve interstate commerce because the securities must ultimately be transferred in New York (but see *Hatch v. Reardon,* 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415, *supra*). But we cannot assume, as the appellants do, that if the nonresident chooses to make the sale in New York—in order to claim the exemption provided by the statute—the transaction would lose its interstate character.

Typical of this latter type of transaction is one in which a resident of one of the areas in which the appellants operate gives his New York broker, or a New York correspondent of a local broker, an order to sell. When, in such a case, the New York broker executes the order, the customer will normally send his stock certificate to the New York broker to fulfill his agreement to sell. Such a sale is not an intrastate transaction. On the contrary in





*Freeman v. Hewit,* 329 U.S. 249, 259, 67 S.Ct. 274, 280, 91 L. Ed. 265, *supra* the Supreme Court considered an identical transaction and concluded "Of course this is an interstate sale". In other words the trouble with the appellants' argument is that a sale by a nonresident on a New York exchange—the type of transaction the law allegedly encourages—is still interstate commerce. Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202, *supra* compels a different result since in that case this precise point was neither argued nor decided.

The order of the Appellate Division should be affirmed.

BREITEL, C. J., and JASEN, GABRIELLI, JONES, FUCHSBERG and COOKE, JJ., concur.

Order affirmed, with costs.

## Appendix B

JULY 9, 1974

**Memorandum Decision of the Appellate Division.**

SUPREME COURT: APPELLATE DIVISION

First Department, May 1974

Emilio Nunez, J.P.
Theodore R. Kupferman,
Aron Steuer,
Louis J. Capozzoli,
Daniel E. Macken, JJ.

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Respondents,*

against

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Appellants.*

812

Appeal by defendants from an order of the Supreme Court at Individual Calendar Part I (George Carney, J.), entered New York County December 20, 1973, denying their motion to dismiss the complaint.

Robert W. Bush of counsel (Ruth Kessler Toch with him on the brief; Louis J. Lefkowitz, Attorney General) for appellant

Roger Pascal of counsel (Milton H. Cohen and Allan Horwich with him on the brief; Schiff Hardin & Waite and Paul, Weiss, Rifkind, Wharton & Garrison, attorneys) for respondents

Samuel J. Warms of counsel (Robert J. Metzler, II, with him on the brief; Adrian P. Burke, Corporation Counsel) for *amicus curiae* City of New York

MACKEN, J.:

By this action, plaintiffs, stock exchanges located in states other than New York, seek a declaration that Section 270-a of the Tax Law, adopted in 1968 and effective July 1, 1969, amending the then existing stock transfer tax law (Tax Law, § 270) is constitutionally invalid, and defendants appeal from an order denying their motion to dismiss the complaint.

Since 1905 this state has imposed a tax "on all sales or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock . . .". Prior to July 1, 1969 all such transactions were taxed at a rate based on the sale price per share of the stock and neither the place where the sale was made nor the residence of the seller had any bearing on the rate of tax. None of the states or cities in which the plaintiffs are located had any such tax and, as found by the Legislature (Laws of 1968, Ch. 827),

> "The securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable."





Accordingly, the 1969 amendment provided that in the case of sales made within this state by a nonresident, the rate of tax was reduced by graduated annual steps to fifty percent on July 1, 1973 and thereafter, and further provided for a maximum tax to be imposed in the case of any sales made within the state relating to shares of the same class and issued by the same issuer, the said maximum by annual graduated steps being reduced to $350 on and after July 1, 1973.

As alleged in the complaint "numerous securities which are bought and sold in the United States are delivered in the State of New York or are transferred . . . by banks and by other transfer agents located within the State of New York," including many securities regularly traded on plaintiff exchanges. A large portion of the taxed securities

traded on plaintiff exchanges are also traded on exchanges located in New York and plaintiffs further allege "The legislative purpose and natural effect of the 1969 Amendments has been and will continue increasingly to be the diversion of such transactions from plaintiff exchanges to stock exchanges located within the State of New York and the diversion, in general, of securities business from those engaged in that business outside the State of New York to those engaged in the securities business within the State of New York" and that the Amendment is violative of (1) Clause 3 of Section 8 of Article I (the Commerce clause), (2) Section 2 of Article IV (the Privileges and Immunities clause), and (3) Section 1 of the Fourteenth Amendment (the Equal Protection clause) of the United States Constitution.

Before answering, defendants moved to dismiss on grounds (1) that the court lacks jurisdiction of the subject matter of the action; (2) that plaintiffs do not have legal capacity to sue since they are not subject to the transfer tax and are not legally aggrieved by its provisions; and (3) that the complaint fails to state a cause of action.

We agree with Special Term that our courts have jurisdiction to decide cases involving rights of litigants under the Federal Constitution unless deprived of that power by the Federal Constitution or Statute (1 Carmody Wait 2d, Courts and Their Jurisdiction, Sec. 2:92) and that plaintiffs have legal standing to maintain the action since the stated legislative findings (L. 1968, ch. 827) and the Governor's memorandum of approval (McKinney's Session Laws 1968, Vol. 2, p. 2384) make it clear that indeed a purpose of the 1969 amendment was to discourage diversion of stock transactions from New York exchanges and to encourage transactions of securities in New York. Plaintiffs





may therefore claim to be potentially injured by the amendment (*Association of Data Processing Organization, Inc. v. Camp,* 397 U.S. 150, 152-154).

We fail to find, however, any constitutional infirmity in the statute here attacked.

In adopting the statute, the basic underlying motivation of the Legislature was not to favor New York stock exchanges over out of state exchanges but to fulfill its duty to enact legislation providing vehicles of taxation sufficient to permit the state and its subdivisions to raise the funds required to meet the ever increasing needs of the people of the state for governmental aid and services. The statewide proceeds of the stock transfer tax are appropriated to the City of New York for the support of its local government (State Finance Law, § 92-b), and it appears from the record that such income for the 1968 city fiscal year was estimat at two hundred twenty-nine million dollars. As may well be inferred from the record, the diversion of business from the New York Stock Exchange to out of state exchanges located in cities and states having no transfer tax had caused the New York exchange to consider leaving the state, and it is apparent that such a move would render New York City and the State a severe financial blow including, in addition to the transfer tax revenue, the loss of thousands of jobs, hundreds of millions in payrolls and many millions in real estate and business taxes. In such event the already tax-burdened state would be obliged to come to the aid of the city.

That the taxing power may be used to promote the economy of the taxing unit by favoring nonresidents over residents is clear. *Allied Stores of Ohio v. Bowers* (358 U.S. 522) involved an Ohio statute exempting from *ad valorem*

taxation "merchandise or agricultural products belonging to a nonresident if held in a storage warehouse for storage only". In upholding the statute against a claim that it violated the equal protection provision of the Fourteenth Amendment the court said (pp. 528, 529):

> "But it is obvious that it may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy, or to stimulate the market for merchandise and agricultural products produced in Ohio by enabling nonresidents to purchase and hold them in the State for storage only, free from taxes, in anticipation of future needs . . ."

In *Spatt v. City of New York,* 13 N.Y.2d 618, appeal dismissed for want of substantial federal question, 375 U.S. 394, a compensating use tax on the sale of an automobile outside of the city to a resident of the city computed upon the total selling price of an automobile without deduction of any trade-in allowance as contrasted with the sales tax on a car purchased by a resident within the city computed on the net receipts of the sale after deducting a trade-in allowance, was held constitutional not only "by reason of the greater cost of enforcing the compensating use tax" but also "the greater likelihood of resale of the used car within the City of New York". While in *Spatt* the purchase was made within the state the use tax applies also to those made outside of the state. *(Matter of Atlantic Gulf and Pacific Co. v. Gerosa,* 16 N.Y.2d 1.) It is to be noted that in the latter case a contention that the tax is an unconstitutional burden on interstate commerce was rejected.





In *Madden v. Kentucky,* 309 U.S. 83, an *ad valorem* tax on citizens of Kentucky on deposits in banks outside of the state at a rate five times that on deposits in banks located in the state was upheld. Although deposits in out of state banks by residents of Kentucky would obviously be thereby discouraged, it was found that the ease of collection warranted the distinction, the court saying (p. 93):

> "In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary. An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them. It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion."

Transactions made in New York are less susceptible to tax evasion than those made outside as evidenced by the legislative finding that "recognition must be given to the ease of completion of such sales outside the State of New York without the payment of any tax". New York may and has provided criminal sanctions on members of exchanges and security dealers for failure to comply with the transfer tax statutes, a remedy not available against non-resident exchanges and dealers. (Tax Law, §§ 270-a, 272.)

As was said in *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 445,

> "At best, the responsibility of devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the

Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

See also *Shapiro v. City of New York,* 32 N.Y.2d 96, and *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356.

The order appealed from should be modified on the law and defendants' motion to dismiss the complaint granted to the extent of directing that a judgment be entered declaring that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional, with costs and disbursements to appellants.

All Concur.



# Appendix C

## Order Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 9, 1974

Present—Hon. Emilio Nunez, Justice Presiding,
Theodore R. Kupferman,
Aron Steuer,
Louis J. Capozzoli,
Daniel E. Macken, Justices.

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Respondents,*

against

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Appellants.*

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An appeal having been taken to this Court by the defendants-appellants from the order of the Supreme Court, New York County (Carney, J.), entered on December 20, 1973, which, inter alia, denied defendants' motion to dismiss the complaint, and said appeal having been argued by Mr. Robert W. Bush of counsel for appellants, by Mr. Roger Pascal of counsel for respondents, and a brief as amicus curiae having been submitted by Mr. Samuel J. Warms of counsel for The City of New York, and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

*Order Appealed From*

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, and defendants' motion to dismiss the complaint granted to the extent of directing that a judgment be entered declaring that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional. Appellants shall recover of respondents $60 costs and disbursements of this appeal.

**ENTER:**

/s/ HYMAN GAMSO
*Clerk.*



## Appendix D

### Judgment Appealed From

The appeal in this action from the order of the Supreme Court, New York County (CARNEY, J.), entered on December 20, 1973, which, inter alia, denied defendants' motion to dismiss the complaint, having come on to be heard during the June, 1974 Term of the Appellate Division, First Department, and the Court after due deliberation having rendered its unanimous decision (opinion by MACKEN, J.) on the 9th day of July, 1974, and an order dated July 9, 1974 having been duly signed and entered thereon on said date in which it was unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, and defendants' motion to dismiss the complaint granted to the extent of directing that a judgment be entered declaring that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional. Appellants shall recover of respondents $60 costs and disbursements of this appeal, it is hereby

ADJUDGED that the complaint is dismissed and it is further,

ADJUDGED, AND Declared that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional, and it is further

ADJUDGED that the defendants shall recover the costs and disbursements in the sum of $434.90 incurred in the said appeal, and have execution therefor.

/s/ NORMAN GOODMAN
*Clerk*

Dated: New York, New York
August 22, 1974.

(FILED Aug. 22, 1974, New York Co. Clerk's Office)

The addresses of the plaintiffs-respondents are as follows:

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## Appendix E

### Memorandum Decision of the Special Term.

SUPREME COURT—New York County

Individual Calendar—Part I

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BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs,*

against

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants.*

Index No. 19417/72

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GEORGE CARNEY, *J.*

This is a motion by defendants State Tax Commission *et. al.* to dismiss the complaint upon the grounds that (1) the Court has no jurisdiction of the subject matter of the cause of action; (2) the plaintiffs have no legal capacity to sue since they are not subject to the stock transfer tax imposed by Article 12 of the Tax Law of New York and are not legally aggrieved by such provisions and have no legal right to question the constitutionality of its provisions; (3) the pleadings fail to state a cause of action against the defendants. Defendants also move for an order compelling plaintiffs to post annual surety bonds pending final determination of this action.

Plaintiffs herein are Stock Exchanges which maintain trading facilities and principal places of business outside of the State of New York and which are used to effect purchases and sales of securities outside of the State of New York. They are suing for a declaratory judgment in accordance with CPLR 3001 that Chapter 827, Section 4 of New York Laws 1968 be declared unconstitutional as violative of (1) clause 3 of Section 8 of Article 1 of the Constitution of the United States (the "Commerce Clause") vesting in the Congress of the United States the exclusive power to regulate commerce among the several states (2) Section 2 of Article 4 of the Constitution of the United States (the "privileges and immunities clause") and (3) Section 1 of the 14th Amendment to the Constitution of the United States (the "equal protection clause") and for an injunction and other relief.

Chapter 827, Section 4 of New York Laws, 1968 which became effective July 1, 1969 amended the New York Tax Law, Section 270, New York Laws 1909, Chapter 62, (the "Stock Transfer Tax") by adding Section 270-a thereto. This amendment set forth a schedule of rates of taxation which appreciably lowered the tax rate on the sale of securities by non-residents within the State of New York. It is not disputed that the reason for the amendment was to improve the competitive position of stock exchanges located within the State and encourage non-residents to make transactions within the State.

Sales of securities by non-residents made outside the State of New York and which are subject to the Stock Transfer Tax (by reason of delivery in New York, or transferral in non-exempt transactions by issuers, banks, or other transfer agents in N. Y. etc.) continue to be taxed at the higher rates





which obtain for New York residents. Thus an impetus is provided for non-residents who transfer securities which would be subject to the Stock Transfer Tax to effect the sale of such securities within the State of New York and qualify for the lower rates.

The plaintiff Exchanges allege that a substantial portion of the business transacted by their member firms etc. are in securities which are taxable under the Stock Transfer Tax by New York and that the effect of the Amendment is to divert such transactions effected on plaintiff Exchanges to exchanges located in New York.

From these facts, set forth above, which are alleged in the complaint, and which, for the purposes of this motion, must be accepted as true, it is clear that the complaint states a cause of action. This determination is made on the pleadings alone and whether or not the plaintiffs will be able to establish the allegations is not a pertinent consideration upon this motion. Their complaint alleges damages caused by a statute which they alleged violates the Federal Constitution, and since the plaintiffs also have standing to bring this action, the complaint is a viable one.

In *Association of Data Processing Service Org. Inc. v. Camp.*, 397 U.S. 150, the Supreme Court laid down the test for determination of standing. "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." (*Id.* at 152) and the second question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," (*Id.* at 153). Plaintiffs have alleged substantial economic loss and raise the question of whether their economic loss is not caused by State

infringement upon Constitutional guarantees. Plaintiffs need not be payers of the tax themselves in order to have proper standing in this action. "No longer does controlling law require that a plaintiff be directly regulated or taxed by a statute in order to challenge its constitutionality. Rather, as urged by plaintiffs herein, under applicable law, a 'proper' plaintiff must only be 'substantially affected' by the statute in question so that he has sufficient interest in the outcome of the litigation to provide that degree of adversity which will create a justicable controversy between the parties. [citing cases]" (*Society of Plastics v. City of N. Y.*, 68 Misc.2d 366 at 369).

*St. Clair v. Yonkers Raceway,* 13 N.Y.2d 72, cited by defendants involved an injury to the plaintiff which was clearly remote and incidental to the tax in question, unlike the instant case and the Court of Appeals in that case said "We have always held that the Constitutionality of a State Statute may be tested only *by one personally aggrieved therein*, and then only if the determination of the grievance requires a determination of constitutionality." (*Id.* at 76, emphasis added).

The Court of Appeals in a later case has cited *Data Processing Service v. Camp, supra,* approvingly and held that a claim of economic injury, caused by the business practices of a competitor in violation of a statute is sufficient to confer standing.

The court thus applied the test from Data Processing as set forth hereinabove to decide standing. (*Columbia Gas v. N. Y. Elec. & Gas,* 28 N.Y.2d 117 at 123).

As to that branch of the motion to dismiss on the grounds the court lacks jurisdiction over the subject matter; it is





clear that State Courts of general jurisdiction have the power to decide cases involving rights of litigants under the Federal Constitution unless deprived of that right by the Federal Constitution or statute. (1 Carmody-Wait 2d, *Courts and Their Jurisdiction,* Sect. 2:92, at 113; *Defiance Water Co. v. Defiance,* 191 U.S. 184; *Missouri ex rel. St. Louis B. & M. R. Co. v. Taylor,* 266 U.S. 200).

Accordingly, the motion by defendants to dismiss the complaint is denied in its entirety. Finally, defendants' motion that plaintiffs post a surety bond or bonds to protect the public revenue is denied with leave to defendants to renew at a proper time.

Dated: 12/19/1973

G. M. C.,
*J. S. C.*

## Appendix F

### Statute Involved

*Laws of 1968, chapter 827*

*(Tax Law, Article 12, § 270-a)*

"Section 1. Legislative findings. The legislature hereby finds that: the securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable.

• • •

"§ 3. Subdivision two of section two hundred seventy of such law, as last amended by section two of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

"2. Except as otherwise provided by section two hundred seventy-a of this chapter, the tax imposed by this section shall be two and one-half cents for each share, except in cases where the shares or certificates are sold, in which cases the tax shall be at the rate of one and one-quarter cents for each share where the selling price is less than five dollars per share; two and one-half cents for each share where the selling price is five dollars or more per share and less than ten dollars per share; three and three-quarters cents for each share where the selling price is ten dollars or more per share and less than twenty dollars per share and five cents for each share where the selling price is twenty dollars or more per share.

"§ 4. Such law is hereby amended by adding thereto a new section to be section two hundred seventy-a, to follow section two hundred seventy and to read as follows:

"§ 270-a. Rates for nonresidents; maximum amounts of tax; penalties. 1. Notwithstanding the provisions of section two hundred seventy of this chapter on and after July first, nineteen hundred sixty-nine, the rates of tax set forth in paragraph (a) of this subdivision and the maximum amounts of tax set forth in subdivision two of this section shall apply, in the case of those sales made within this state subject to tax under section two hundred seventy and described in paragraph (a) of this subdivision and subdivision two of this section.

"(a) On such sales by a nonresident during the periods set forth in the following table, the rates of the





tax shall be the percentages, set forth in such table, of the rates of tax provided in section two hundred seventy of this article:

| Period | Percentage of Rates of Tax Provided in Section two hundred seventy of this article |
|---|---|
| July 1, 1969 to June 30, 1970 | 95% |
| July 1, 1970 to June 30, 1971 | 90% |
| July 1, 1971 to June 30, 1972 | 80% |
| July 1, 1972 to June 30, 1973 | 65% |
| July 1, 1973 and thereafter | 50% |

The tax so calculated shall not be carried out in its computation beyond four decimal points, that is, it shall be computed to the nearest one one-hundredth of one cent.

"(b) For the purposes of this section the following terms shall have the following meanings:

"A 'nonresident' shall mean an individual or a group of individuals jointly owning securities (but including partnerships only if organized and operating solely for the purpose of investing in securities) selling or trading on his or their own account, who is not, or no one of whom is, a resident.

"A 'resident' means an individual who on the day upon which the tax imposed by section two hundred seventy of this chapter accrues,

"(1) regardless of where he resides or is domiciled, (i) is a member of a securities exchange within this state which is registered with the securities and ex-

change commission of the United States; (ii) is a dealer in securities required to be registered with the attorney general of the state of New York; (iii) acts as a dealer in securities or as a broker or agent in transactions concerned with the sale and purchase of securities; or (iv) is a member of or a person employed in a managerial capacity by a firm, company, association or organization, or an officer or director of a person employed in a managerial capacity by a corporation, which is a member organization of a securities exchange, a dealer in securities, or a dealer, broker or agent, described in clauses (i), (ii) or (iii) of this subparagraph, or

"(2) is domiciled in this state, unless on such day he maintained no permanent place of abode in this state, maintained a permanent place of abode elsewhere and during the one year period ending on such day spent in the aggregate, not more than thirty days of such period in this state, or

"(3) is not domiciled in this state, but on such day maintained in this state, a permanent place of abode unless such abode is due solely to such individual's being in the armed forces of the United States, or

"(4) regardless of where he resides, maintains a permanent place of business within this state or is employed within this state.

"(c) No transaction shall be deemed to be by a nonresident and subject to tax at the rates prescribed in this section unless (1) the papers or documents upon or to which are required to be placed or affixed the stamps required by subdivision four of section two hundred seventy of this chapter, to denote the payment of the





tax imposed by such section, have also affixed thereto or placed thereon a declaration in form prescribed by the tax commission signed by the person making the sale or transfer, setting forth facts to show that the transaction is one coming within the provisions of this section; or (2) in the case of transactions executed or effected within this state by any member or member organization of any securities exchange within this state which is registered with the securities and exchange commission of the United States (hereinafter in this section referred to as 'member of a securities exchange') or by any person, firm, corporation, company or association required to be registered with the attorney general of the state of New York as a dealer in securities other than upon any such exchange (hereinafter in this section referred to as 'registered dealer'), who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter, to pay the tax imposed by this article without the use of the stamps prescribed by this article, the sale is certified, in such form as the tax commission may prescribe, in the report required to be made to such exchange, or its affiliated clearing corporation or any authorized agency by rules and regulations promulgated by the tax commission pursuant to section two hundred eighty-one-a of this chapter, as being a transaction coming within the provisions of this section. The certification in such report may be made by such member of a securities exchange or registered dealer if he either (i) has obtained from such nonresident a declaration in form prescribed by the tax commission,

or (ii) has met requirements set forth in rules and regulations promulgated by the tax commission, establishing that the sale is one coming within the provisions of this section and (iii) has not on or after the date of obtaining such declaration or its delivery and filing, received from such nonresident either a notice of cancellation, in form prescribed by the tax commission, as described in subparagraph three of paragraph (b) of subdivision three of this section, and has no knowledge or reasonable grounds to believe that the status of such nonresident as a nonresident has changed.

"2. Where any sale made within the state and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale *shall not exceed,* during the period beginning on July first, nineteen hundred sixty-nine and ending on June thirtieth, nineteen hundred seventy, the sum of two thousand five hundred dollars; during the period beginning on July first, nineteen hundred seventy and ending on June thirtieth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending on June thirtieth, nineteen hundred seventy-two, the sum of seven hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-two and ending on June thirtieth, nineteen hundred seventy-three, the sum of five hundred dollars; and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars; provided, however, that sales made with-





in this state by any member of a securities exchange or by any registered dealer, who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter to pay the taxes imposed by this article without the use of the stamps prescribed by this article, pursuant to one or more orders placed with the same member of a securities exchange or the same registered dealer on one day, by the same person, each relating to shares or certificates of the same class and issued by the same issuer, all of which sales are executed on the same day (regardless of whether it be the day of the placing of the orders), shall, for the purposes of this subdivision two, be considered to constitute a single taxable sale.

"3. (a) Any person who shall knowingly make any false statement in a declaration provided for by paragraph (c) of subdivision one of this section, shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or be subject to both such fine and imprisonment, in the discretion of the court.

"(b) Any person who—

"(1) having executed, filed with and delivered to a member of a securities exchange or a registered dealer a declaration provided for by paragraph (c) of subdivision one of this section;

"(2) thereafter ceases knowingly to be a nonresident;

"(3) fails to execute, file and deliver a notice of cancellation of such declaration, with and to such member or dealer; and

"(4) after ceasing to be such a nonresident and prior to the execution, filing and delivery of such notice of cancellation, with intent to evade or defeat the collection of any tax imposed by this article, places and allows to be executed an order with such member or dealer for the sale of any shares or certificates described in section two hundred seventy of this chapter; shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or be subject to both such fine and imprisonment, in the discretion of the court."



## Appendix G

### Legislative Developments That May Affect the Application of Section 270-a of the New York Transfer Tax in Certain Circumstances

On December 1, 1975, after decision by the State of New York Court of Appeals in this case, Section 21(2)(d) of the Securities Acts Amendments of 1975, Pub.L.No. 94-29 (June 4, 1975), became effective. Section 28(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(d), as amended thereby, now reads:

> No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee therefor or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision. No State or political subdivision thereof shall impose any tax on securities which are deposited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision.

The State of New York Department of Taxation and Finance has recognized this law as prohibiting collection

of taxes imposed under the New York Transfer Tax where the "sole event in New York State is the delivery or transfer to or by a 'registered clearing agency' or a 'registered transfer agent'. . . ." *Release of the State of New York Department of Taxation and Finance,* December 1, 1975.

If this situation continues, one application of section 270-a which is challenged in this case would be rendered void: *viz.,* the discriminatory taxation of securities transfers preceded by an out-of-state sale when transfer is effected by a "registered transfer agent."[1] The New York

[1] For purposes of the Securities Exchange Act of 1934, a transfer agent is

> . . . any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. The term "transfer agent" does not include any insurance company or separate account which performs such functions solely with respect to variable annuity contracts or variable life policies which it issues or any registered clearing agency which performs such functions solely with respect to options contracts which it issues. Securities Exchange Act of 1934, § 3(a)(25), 15 U.S.C. § 78c(25).

Unless exempted by the appropriate regulatory agency, it is

> . . . unlawful for any transfer agent, unless registered in accordance with this section, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the function of a transfer agent with respect to any security registered under section 12 of this title or which would be required to be registered except for the exemption from registration provided by subsections 12(g)(2)(B) or 12(g)(2)(G) of that section. Securities Exchange Act of 1934, § 17A(c)(1), 15 U.S.C. § 78q-1(c)(1).





tax in that situation would remain uncollectable by Congressional mandate.

Plaintiffs suggest, however, that in the near future federal law may be changed to permit New York to reinstate its taxation of transfers effected by registered transfer agents. At the signing of Pub.L.No. 94-29, President Ford stated:

> . . . I understand that the legislation contains an inadvertent technical error concerning the presence of a transfer agent as a jurisdictional basis for state or local taxation of securities transactions. I also understand that legislation to correct this error retroactively is being prepared, and that such legislation will receive prompt consideration in Congress. When such corrective legislation is presented to me, I intend to sign it.[2]

Following the enactment of Pub.L.No. 94-29, bills were considered in both Houses of Congress to "correct" the "inadvertent" impact of Pub.L.No. 94-29 on the New York Tax Law. S.2136, 94th Cong., 1st Sess. (1975); S.2615, 94th Cong., 1st Sess. § 12 (1975); H.R.9852, 94th Cong., 1st Sess. § 10 (1975). S.2136 and similar bills are expected to receive renewed consideration when the 94th Congress reconvenes in January, 1976, and may, in fact, become law before the Court's normal calendar will allow consideration of the Jurisdictional Statement filed by plaintiffs in this case.

Regardless of the final Congressional action with respect to the power of the states to tax transfers effected by registered transfer agents, the discriminatory impact of section 270-a in its other applications continues. For example, if a New York resident sells a block of securities to another New York resident and the latter receives delivery

[2] Office of the White House Press Secretary, News Release (June 5, 1975).

in New York, the tax due is heavier if the preceding sale occurred outside the state than if it occurred in-state—and Pub.L.No. 94-29 in no way changes this result. Similarly, if a non-resident sells to a New York resident who receives delivery of the securities in New York, the "non-resident discount" will continue to be available only if the sale occurs in-state. Further, if an in-state transfer of securities is effected by a person other than a registered transfer agent,[3] the place of sale retains all of its discriminatory consequences.

[3] The appropriate regulatory agency has the power to exempt transfer agents from registration if such exemption is in the public interest. 15 U.S.C. § 78q-1(c)(1).



## Appendix H

### Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Appellants,*

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Respondents.*

New York County Clerk's Index No. 19417/72

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Boston Stock Exchange, Cincinnati Stock Exchange, Detroit Stock Exchange, Midwest Stock Exchange, Incorporated, Pacific Coast Stock Exchange, PBW Stock Exchange, Inc., the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the State of New York Court of Appeals, No. 368, entered in this action on October 21, 1975, affirming the order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of said Appellate Division on July 9, 1974, which substantially modified the order of the Supreme Court, New York County, entered in the office

of the Clerk of New York County on December 20, 1973, by granting defendants-respondents' motion to dismiss the complaint to the extent of directing that a judgment be entered declaring that the provisions added to the New York Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: December 5, 1975

SCHIFF HARDIN & WAITE

By ............................
ROGER PASCAL

7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
*Attorneys for Plaintiffs-Appellants*

TO:

Louis J. Lefkowitz
Attorney General of the
State of New York
The Capitol
Albany, New York 12224

Adrian Burke
Corporation Counsel
The City of New York
Municipal Building
New York, New York 10007

Clerk of New York County
60 Centre Street
New York, New York 10007





AFFIDAVIT OF SERVICE BY MAIL

Roger Pascal, being duly sworn, deposes and says:

1. Deponent is not a party to the action, is over 18 years of age, and resides at 1025 Forest, Evanston, Illinois.

2. That on the 5th day of December, 1975, deponent served the within Notice of Appeal upon:

Louis J. Lefkowitz
Attorney General of the
State of New York
The Capitol
Albany, New York 12224

Adrian Burke
Corporation Counsel
The City of New York
Municipal Building
New York, New York 10007

at the foregoing addresses, the addresses designated by the attorneys for that purpose, by causing true copies of same to be mailed to them, first class postage prepaid.

ROGER PASCAL

Sworn to before me this
5th day of December, 1975

THERESE GLATZHOFER
Notary Public

# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1019

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BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Appellants,*

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Appellees.*

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APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

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**Jurisdictional Statement Filed January 19, 1976**
**Probable Jurisdiction Noted March 22, 1976**

**APPENDIX**

IN THE

# Supreme Court Of The United States

October Term, 1975

**No. 75-1019**

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BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Appellants,*

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Appellees.*

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Appeal From The State of New York Court of Appeals

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## INDEX

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

| | |
|---|---|
| **August 31, 1972** | **—Service of Summons and Complaint on defendants and filing of same in the Supreme Court of the State of New York, County of New York.** |
| **October 31, 1972** | **—Service of defendants' Notice of Motion to Dismiss the Complaint.** |
| **December 19, 1973** | **—Order and Memorandum Opinion entered denying defendants' Motion to Dismiss the Complaint and denying defendants' motion to require plaintiffs to post a surety bond.** |
| **January 10, 1974** | **—Defendant's Notice of Appeal to the Appellate Division of the Supreme Court of New York County filed.** |
| **July 9, 1974** | **—Order of the Appellate Division entered directing that the judgment below be modified to declare that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional.** |
| **August 22, 1974** | **—Judgment entered by the trial court pursuant to order of the Appellate Division declaring that the provisions added to the Tax Law by Chapter 827 of the laws of 1968 are valid and constitutional.** |
| **August 23, 1974** | **—Plaintiffs' Notice of Appeal to the State of New York Court of Appeals filed.** |
| **October 21, 1975** | **—Opinion and order of the Court of Appeals entered affirming the order of the Appellate Division.** |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Boston Stock Exchange, Cincinnati Stock Exchange, Detroit Stock Exchange, Midwest Stock Exchange, Incorporated, Pacific Coast Stock Exchange, PBW Stock Exchange, Inc.,

*Plaintiffs,*

v.

State Tax Commission, Norman Gallman, Milton Koerner, and A. Bruce Manley, as members of the State Tax Commission of the State of New York,

*Defendants.*

## Complaint

Plaintiffs by their attorneys complaining of the above-named defendants allege:

1. Plaintiffs Boston Stock Exchange, Detroit Stock Exchange and Pacific Coast Stock Exchange are unincorporated associations. Plaintiff Cincinnati Stock Exchange is an Ohio not-for-profit corporation. Plaintiffs Midwest Stock Exchange, Incorporated and PBW Stock Exchange, Inc. are Delaware corporations. Plaintiffs are hereinafter sometimes referred to collectively as "plaintiff Exchanges." The members and member organizations of plaintiff Exchanges utilize the facilities of the respective plaintiff Exchanges to effect purchases and sales of securities for their own respective accounts or for the accounts of customers or both. Each of the plaintiff Exchanges maintains its trading facilities and principal place of business outside of the State of New York and all sales of securities effected on each of the plaintiff Exchanges are effected outside of the State of New York. Each of the plaintiff Exchanges



**is registered as a national securities exchange under Section 6 of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78f). Each of the plaintiff Exchanges brings this action on its own behalf and on behalf of all of its respective members and member organizations.**

**2. The defendant State Tax Commission is the agency of the State of New York which is charged under the laws of the State of New York (Tax Law, §§ 171, 176, 271, 279-a, 279-b, et al.) with the determination and collection of the "Stock Transfer Tax" as hereinafter defined.**

**3. Defendant Norman Gallman is president of the State Tax Commission and the Commissioner of Taxation and Finance. Defendants Milton Koerner and A. Bruce Manley are the two commissioners on the State Tax Commission. Defendants Gallman, Koerner and Manley are sued in their respective official capacities as hereinabove stated.**

**4. Since prior to July 1, 1969 there has been in force and effect a statute of the State of New York which provides in part as follows:**

> **"1. There is hereby imposed and shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock . . ." N. Y. Tax Law, § 270; N. Y. Laws 1909, c. 62, as amended.**

**This statute and the tax imposed thereby are hereinafter referred to as the "Stock Transfer Tax."**

**5. Prior to July 1, 1969 all transactions subject to taxation under the Stock Transfer Tax were taxed at a rate based solely on the selling price per share of the stock subject to taxation. Prior to such date, neither the place in the United States where the sale was made nor the State**

of the United States in which the seller resided had any bearing on the rate of tax of the Stock Transfer Tax.

6. In 1968 the New York legislature enacted a statute (N. Y. Laws 1968, c. § 827), Section 4 of which amended the Stock Transfer Tax by adding Section 270-a thereto. By the terms of said statute, said Section 270-a became effective July 1, 1969. Said Section 270-a ("the 1969 Amendments") provided in part as follows:

> "1. Notwithstanding the provisions of section two hundred seventy of this chapter on and after July first, nineteen hundred sixty-nine, the rates of tax set forth in paragraph (a) of this subdivision and the maximum amounts of tax set forth in subdivision two of this section shall apply, *in the case of those sales made within this state* subject to tax under section two hundred seventy and described in paragraph (a) of this subdivision and subdivision two of this section.
>
> (a) On such sales by a nonresident during the periods set forth in the following table, the rates of tax shall be the percentages, set forth in such table, of the rates of tax provided in section two hundred seventy of this article:

| *Period* | *Percentage of Rates of Tax Provided in Section two hundred seventy of this article* |
|---|---|
| July 1, 1969 to June 30, 1970 ....... | 95% |
| July 1, 1970 to June 30, 1971 ....... | 90% |
| July 1, 1971 to June 30, 1972 ....... | 80% |
| July 1, 1972 to June 30, 1973 ....... | 65% |
| July 1, 1973 and thereafter ........ | 50% |

> The tax so calculated shall not be carried out in its computation beyond four decimal points, that is, it shall be computed to the nearest one one-hundredth of one cent.
>
> • • •



> "2. Where any sale *made within the state* and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale shall not exceed, during the period beginning on July first, nineteen hundred sixty-nine and ending on June thirtieth, nineteen hundred seventy, the sum of two thousand five hundred dollars; during the period beginning on July first, nineteen hundred seventy and ending on June thirtieth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending on June thirtieth, nineteen hundred seventy-two the sum of seven hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-two and ending on June thirtieth, nineteen hundred seventy-three, the sum of five hundred dollars; and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars; . . ." [Emphasis supplied.]

7. The stated purpose of the New York legislature in enacting the 1969 Amendments was to improve the competitive positions of stock exchanges located within New York State and that segment of the American securities industry located within New York State vis-a-vis stock exchanges and participants in the securities industry located outside of New York. The legislative findings of the New York legislature which were enacted as part of the 1969 Amendments provide as follows:

> "The legislature hereby finds that: The Securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of

the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable." N. Y. Laws 1968, c. 827, § 1, eff. July 1, 1968.

8. In general, the principal changes in the determination of the rate of the Stock Transfer Tax effected by the 1969 Amendments are as follows:

(a) transfers of securities by nonresidents of New York which are subject to the Stock Transfer Tax are taxed at a higher rate when the sales thereof are made outside of the State of New York than when such sales are effected within the State of New York; and

(b) a maximum limitation on the amount of the Stock Transfer Tax is available only with respect to the transfers of securities which are sold within the State of New York, while there is no maximum limitation on the amount of the tax with respect to sales made outside the State of New York which are subject to the Stock Transfer Tax; and

(c) the differential between the rate of taxation of transactions made within the State of New York and the rate of taxation of like transactions made without the State of New York has been and will be increased, under the 1969 Amendments on July 1 of each year from 1969 to 1973.



9. Upon information and belief, numerous securities which are bought and sold in the United States are delivered in the State of New York or are transferred in non-exempt transactions by the issuers thereof, by banks and by other transfer agents located within the State of New York. All such securities are hereinafter referred to as "Taxed Securities."

10. Upon information and belief, numerous Taxed Securities are regularly traded on plaintiff Exchanges. The Taxed Securities traded on plaintiff Exchanges include securities issued by many major American corporations and securities actively traded in the American securities industry.

11. Upon information and belief, a large portion of the Taxed Securities which are traded on plaintiff Exchanges are also traded on securities exchanges located within the State of New York or are otherwise bought and sold within the State of New York.

12. Upon information and belief, a substantial portion of the securities transactions effected on plaintiff Exchanges by their respective members and the customers of such members and others is in Taxed Securities. The legislative purpose and natural effect of the 1969 Amendments has been and will continue increasingly to be the diversion of such transactions from plaintiff Exchanges to stock exchanges located within the State of New York and the diversion, in general, of securities business from those engaged in that business outside the State of New York to those engaged in the securities business within the State of New York.

13. Clause 3 of Section 8 of Article 1 of the Constitution of the United States (the "Commerce Clause") vests in the

Congress of the United States the exclusive power to regulate commerce among the several states. The sale of Taxed Securities made outside New York State or made by or through the facilities of any plaintiff herein is "commerce among the several states" within the meaning of the Commerce Clause. The Commerce Clause prohibits State legislation which interferes with interstate commerce by placing an undue burden upon or discriminating against interstate commerce. The 1969 Amendments are unconstitutional in that they violate the Commerce Clause because:

(a) they unduly burden interstate commerce by imposing a higher rate of tax when sales by nonresidents of Taxed Securities are made outside the State of New York than when such sales are made within the State of New York;

(b) they discriminate against plaintiff Exchanges, their members and the customers of such members by increasing the cost of selling Taxed Securities in, or using the facilities of, interstate commerce outside the State of New York;

(c) they protect citizens and businesses within the State of New York from competition in interstate commerce through the imposition of higher rates of tax on transfers when sales of Taxed Securities are made outside the State of New York than when such sales are made within the State of New York;

(d) they create a tax rate differential which bears no relationship to the taxpayers' activities or enjoyment of opportunities and protections within the State and which, in fact, discriminatorily, arbitrarily, and unreasonably imposes a lesser tax on transactions which involve greater activity within the State of New York; and

(e) they utilize the state taxing power to regulate commerce between the states by seeking to adjust competitive advantages between local stock exchanges and others in the New York securities industry on the one hand, and their counterparts outside of New York on the other.



14. Section 2 of Article 4 of the Constitution of the United States (the "privileges and immunities clause") provides that, "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The privileges and immunities clause voids state legislation which interferes with the right of citizens of one state to do business in another state on terms substantially equal to those enjoyed by citizens of the other state. The 1969 Amendments violate the privileges and immunities clause by creating an economic barrier for nonresident sellers of Taxed Securities to effect their transactions outside the State of New York, thereby unreasonably discriminating against plaintiff Exchanges, their members and the customers of such members.

15. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in part, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This clause ("equal protection clause") voids state legislation which creates a statutory classification which is not reasonably related to the legitimate purposes of such legislation. The 1969 Amendments violate the equal protection clause because their stated purpose and natural effect is to discriminate in favor of and bestow undue economic advantage upon stock exchanges within the State of New York by diverting business from stock exchanges located outside the State of New York, including plaintiff Exchanges.

16. Defendants have collected and continue to collect taxes imposed by the Stock Transfer Act as amended

by the 1969 Amendments, and the discriminatory impact of the 1969 Amendments will increase on July 1 of each year until 1973 when the lower tax rate and maximum tax reach their most discriminatory levels.

17. The enforcement of the 1969 Amendments with their intended and natural effect of diverting securities business from non-New York stock exchanges, including plaintiff Exchanges, to stock exchanges within the State of New York will inflict increasingly irreparable damage upon plaintiff Exchanges as the discriminatory impact of the 1969 Amendments increases. Such damage will include:

(a) a decline in the volume of securities transactions on plaintiff Exchanges in Taxed Securities and the consequent loss of income as a direct result of such decline;

(b) a growing impediment to the ability of plaintiff Exchanges to attract new members and to retain existing members.

18. An actual and justiciable controversy exists between plaintiffs and defendants with respect to the questions presented herein. The unconstitutional impact of the 1969 Amendments affects every business community in the United States where members of the public and their broker-dealers buy and sell Taxed Securities.

19. The protection of the public interest requires the intervention of this Court, the entry of a declaratory judgment in accordance with the provisions of CPLR § 3001 and allowances of the injunctive relief for which plaintiffs pray herein.

WHEREFORE, plaintiffs pray:

(a) That the certain statute designated Chapter 827, Section 4 of New York Laws 1968, enacted by the New York Legislature, and which purported to become effective July 1,



1969 be declared, adjudged and decreed to be repugnant to the Constitution of the United States and void in its entirety;

(b) That defendants, and each of them, be temporarily and permanently restrained and enjoined from enforcing the aforesaid law and from collecting, imposing, levying, assessing or issuing warrants for the collection of any tax in accordance with the rate structure of the aforesaid law;

(c) That, pending the final determination of the issues in this cause, this Court entered such orders as this Court shall deem appropriate to protect the rights and interests of all persons and governmental bodies having any interest in this cause;

(d) That plaintiffs be granted their costs herein expended and reasonable attorneys' fees; and that plaintiffs have such other, further and different relief as this Court shall deem proper in the premises.

Dated: New York, N. Y.
August 30, 1972

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON,
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New York, New York 10022,
(212) 935-8000,
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Tel.: Area Code 312 Ce 6-4500,
Of Counsel.

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(Verified August 30, 1972.)

SUPREME COURT OF THE STATE OF NEW YORK
County of New York
(Caption Omitted in Printing.)

## Notice of Motion

Sir:

PLEASE TAKE NOTICE that on the summons and complaint herein, a motion will be made at Part I, Special Term of this Court, to be held in and for the County of New York, at the Courthouse in the City of New York, on the 30th day of November, 1972, at 9:30 a.m. or as soon thereafter as counsel can be heard, for a judgment dismissing the complaint herein pursuant to section 3211 of the Civil Practice Law and Rules upon the grounds that:

(a) the Court has no jurisdiction of the subject matter of the cause of action;

(b) the plaintiffs have no legal capacity to sue since they are not subject to the stock transfer tax imposed by Article 12 of the Tax Law and are not legally aggrieved by such provisions and have no legal right to question the constitutionality of its provision;

(c) the pleadings fail to state a cause of action against the defendants;

and for such other, further and different relief as may be proper, with costs of this motion.

PLEASE TAKE FURTHER NOTICE that the defendants will also move at the above Term of this Court for an order to be made and entered compelling plaintiffs to post annual surety bonds to protect the public revenue of the State of New York pending final determination of this action for the reasons set forth in the affidavit of Victor A. Redling, annexed hereto and made a part hereof if plaintiffs obtain the injunctive relief herein sought, and for such



other, further and different relief as may be proper, with costs of this motion.

Dated: October 31, 1972.

Yours, etc.,

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,
*Attorney for Defendants,*
The Capitol,
Albany, New York 12224.

To:

Paul, Weiss, Rifkind, Wharton & Garrison, Esqs.,
Attention: Warren Green, Esq.,
*Attorneys for Plaintiffs,*
345 Park Avenue,
New York, New York 10022.

*Laws of 1968, chapter 827*

*(Tax Law, Article 12, § 270-a)*

"Section 1. Legislative findings. The legislature hereby finds that: the securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable.

• • •

"§ 3. Subdivision two of section two hundred seventy of such law, as last amended by section two of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:



**"2. Except as otherwise provided by section two hundred seventy-a of this chapter, the tax imposed by this section shall be two and one-half cents for each share, except in cases where the shares or certificates are sold, in which cases the tax shall be at the rate of one and one-quarter cents for each share where the selling price is less than five dollars per share; two and one-half cents for each share where the selling price is five dollars or more per share and less than ten dollars per share; three and three-quarters cents for each share where the selling price is ten dollars or more per share and less than twenty dollars per share and five cents for each share where the selling price is twenty dollars or more per share.**

**"§ 4. Such law is hereby amended by adding thereto a new section to be section two hundred seventy-a, to follow section two hundred seventy and to read as follows:**

**"§ 270-a. Rates for nonresidents; maximum amounts of tax; penalties. 1. Notwithstanding the provisions of section two hundred seventy of this chapter on and after July first, nineteen hundred sixty-nine, the rates of tax set forth in paragraph (a) of this subdivision and the maximum amounts of tax set forth in subdivision two of this section shall apply, in the case of those sales made within this state subject to tax under section two hundred seventy and described in paragraph (a) of this subdivision and subdivision two of this section.**

**"(a) On such sales by a nonresident during the periods set forth in the following table, the rates of the**

tax shall be the percentages, set forth in such table, of the rates of tax provided in section two hundred seventy of this article:

| Period | Percentage of Rates of Tax Provided in Section two hundred seventy of this article |
|---|---|
| July 1, 1969 to June 30, 1970 | 95% |
| July 1, 1970 to June 30, 1971 | 90% |
| July 1, 1971 to June 30, 1972 | 80% |
| July 1, 1972 to June 30, 1973 | 65% |
| July 1, 1973 and thereafter | 50% |

The tax so calculated shall not be carried out in its computation beyond four decimal points, that is, it shall be computed to the nearest one one-hundredth of one cent.

"(b) For the purposes of this section the following terms shall have the following meanings:

"A 'nonresident' shall mean an individual or a group of individuals jointly owning securities (but including partnerships only if organized and operating solely for the purpose of investing in securities) selling or trading on his or their own account, who is not, or no one of whom is, a resident.

"A 'resident' means an individual who on the day upon which the tax imposed by section two hundred seventy of this chapter accrues,

"(1) regardless of where he resides or is domiciled, (i) is a member of a securities exchange within this state which is registered with the securities and exchange commission of the United States; (ii) is a dealer in securities required to be registered with the attorney general of the state of New York; (iii) acts as a dealer in securities or as a broker or agent in transactions concerned with the sale and purchase of securities; or (iv) is a member of or a person employed in a managerial capacity by a firm, company, association or organization, or an officer or director of a person employed in a managerial capacity by a corporation, which is a member organization of a securities exchange, a dealer in securities, or a dealer, broker or agent, described in clauses (i), (ii) or (iii) of this subparagraph, or



"(2) is domiciled in this state, unless on such day he maintained no permanent place of abode in this state, maintained a permanent place of abode elsewhere and during the one year period ending on such day spent in the aggregate, not more than thirty days of such period in this state, or

"(3) is not domiciled in this state, but on such day maintained in this state, a permanent place of abode unless such abode is due solely to such individual's being in the armed forces of the United States, or

"(4) regardless of where he resides, maintains a permanent place of business within this state or is employed within this state.

"(c) No transaction shall be deemed to be by a nonresident and subject to tax at the rates prescribed in this section unless (1) the papers or documents upon or to which are required to be placed or affixed the stamps required by subdivision four of section two hundred seventy of this chapter, to denote the payment of the

tax imposed by such section, have also affixed thereto or placed thereon a declaration in form prescribed by the tax commission signed by the person making the sale or transfer, setting forth facts to show that the transaction is one coming within the provisions of this section; or (2) in the case of transactions executed or effected within this state by any member or member organization of any securities exchange within this state which is registered with the securities and exchange commission of the United States (hereinafter in this section referred to as 'member of a securities exchange') or by any person, firm, corporation, company or association required to be registered with the attorney general of the state of New York as a dealer in securities other than upon any such exchange (hereinafter in this section referred to as 'registered dealer'), who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter, to pay the tax imposed by this article without the use of the stamps prescribed by this article, the sale is certified, in such form as the tax commission may prescribe, in the report required to be made to such exchange, or its affiliated clearing corporation or any authorized agency by rules and regulations promulgated by the tax commission pursuant to section two hundred eighty-one-a of this chapter, as being a transaction coming within the provisions of this section. The certification in such report may be made by such member of a securities exchange or registered dealer if he either (i) has obtained from such nonresident a declaration in form prescribed by the tax commission,



or (ii) has met requirements set forth in rules and regulations promulgated by the tax commission, establishing that the sale is one coming within the provisions of this section and (iii) has not on or after the date of obtaining such declaration or its delivery and filing, received from such nonresident either a notice of cancellation, in form prescribed by the tax commission, as described in subparagraph three of paragraph (b) of subdivision three of this section, and has no knowledge or reasonable grounds to believe that the status of such nonresident as a nonresident has changed.

"2. Where any sale made within the state and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale *shall not exceed*, during the period beginning on July first, nineteen hundred sixty-nine and ending on June thirtieth, nineteen hundred seventy, the sum of two thousand five hundred dollars; during the period beginning on July first, nineteen hundred seventy and ending on June thirtieth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending on June thirtieth, nineteen hundred seventy-two, the sum of seven hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-two and ending on June thirtieth, nineteen hundred seventy-three, the sum of five hundred dollars; and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars; provided, however, that sales made with-

in this state by any member of a securities exchange or by any registered dealer, who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter to pay the taxes imposed by this article without the use of the stamps prescribed by this article, pursuant to one or more orders placed with the same member of a securities exchange or the same registered dealer on one day, by the same person, each relating to shares or certificates of the same class and issued by the same issuer, all of which sales are executed on the same day (regardless of whether it be the day of the placing of the orders), shall, for the purposes of this subdivision two, be considered to constitute a single taxable sale.

"3. (a) Any person who shall knowingly make any false statement in a declaration provided for by paragraph (c) of subdivision one of this section, shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or be subject to both such fine and imprisonment, in the discretion of the court.

"(b) Any person who—

"(1) having executed, filed with and delivered to a member of a securities exchange or a registered dealer a declaration provided for by paragraph (c) of subdivision one of this section;

"(2) thereafter ceases knowingly to be a nonresident;



"(3) fails to execute, file and deliver a notice of cancellation of such declaration, with and to such member or dealer; and

"(4) after ceasing to be such a nonresident and prior to the execution, filing and delivery of such notice of cancellation, with intent to evade or defeat the collection of any tax imposed by this article, places and allows to be executed an order with such member or dealer for the sale of any shares or certificates described in section two hundred seventy of this chapter; shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or be subject to both such fine and imprisonment, in the discretion of the court."

*Governor's Message of Necessity (1968 Public Papers of Governor Rockefeller, pp. 651-652)*

"To the Legislature:

"Pursuant to the provisions of Section 14 of Article III of the Constitution and by virtue of the authority conferred upon me, I do hereby certify to the necessity of an immediate vote on Assembly Bill Number 6394-A, Senate Print Number 7061, entitled:

• • •

"The facts which, in my opinion, necessitate an immediate vote on this bill are as follows:

"The bill would extend and modify the stock transfer tax including provisions agreed upon by the City of New York and the New York Stock Exchange and considered essential to the continued presence of the Exchange in the City.

"Because the bill in its final form has not been on your desk three calendar legislative days, the Leaders of your Honorable Bodies have requested this message to permit immediate consideration of the bill prior to the anticipated final adjournment of this legislative session.

"GIVEN under my hand and the Privy Seal of the State at the Capitol in the City of Albany this twenty-fourth day of May in the year of our Lord one thousand nine hundred sixty-eight.

[L. S.]

By the Governor:
(Signed) NELSON A. ROCKEFELLER

(Signed) MICHAEL WHITEMAN
First Assistant and Acting Counsel to the Governor"



*Governor's Memorandum on Approval of chapter 827, supra (1968 Public Papers of Governor Rockefeller, pp. 552-554; see also: 1968 Legislative Annual, p. 482; 1968 McKinney's Session Laws of New York, Vol. 2, p. 2384)*

"STATE OF NEW YORK-EXECUTIVE CHAMBER

ALBANY June 16, 1968

"Memorandum filed with Assembly Bill Number 6394-A, Senate Reprint Number 7061, entitled:

• • •

"APPROVED.

"The bill amends the Tax Law to continue the present rates of the stock transfer tax (which would have otherwise lapsed) until July 1, 1969 and thereafter to provide for a reduction in the rates of stock transfer tax imposed on non-resident individuals and a ceiling on the tax imposed on any single transaction.

"The measure is the product of more than two years' study, discussion and negotiation between representatives of the New York Stock Exchange and the City of New York and provides a long-needed reform of the stock transfer tax, consistent with the growing revenue needs of the City.

"Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry to one of national and international scope. While the bulk of stock transfers still funnels through New York, only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State

where more than 90 percent of trading is in securities listed on the New York Stock Exchange. The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.

"The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and will provide long-term relief from some of the competitive pressures from outside the State.

"As a result of adoption of the revisions of the stock transfer tax contained in this bill, the New York Stock Exchange has announced that it intends to remain and expand in New York and is now studying sites for a new exchange building in downtown Manhattan. The Exchange's action augurs well for the future growth of New York as the Nation's financial center and acknowledges the confidence of the industry in the ability of city government and the Legislature to recognize the industry's problems and to commit themselves to a long-term course for the benefit of all.

"The bill is approved.

(Signed) NELSON A. ROCKEFELLER"

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STATEMENT OF ROBERT W. HAACK, PRESIDENT OF THE NEW YORK STOCK EXCHANGE ON THE AMENDMENTS TO THE NEW YORK STOCK TRANSFER TAX.

(A. 6394 and S. . . . . . . . . . .)

March 4, 1968

Bills amending the New York Stock Transfer Tax Law have been introduced in both the Assembly and the Senate. These bills (A. 6394 and S. . . . . . . . .) represent the product of many months of discussion with City and State officials. In our opinion, this program of reform of the New York stock transfer tax is a significant example of government and business working together to propose solutions to mutual problems by joint discussion and joint effort.

These bills recognize the financial needs of the City as well as the competitive problems of the New York securities markets by providing for a five-year step-by-step reform program which will result in no loss of tax revenue to New York City. In fact, it is estimated that the revenues from the tax would continue to increase.

Trusting favorable consideration of this program of tax reform by the legislature and Governor Rockefeller, the Board of Governors of the New York Stock Exchange has decided that the Exchange will stay in New York City.

As a matter of fact, the Facilities Committee of the Exchange's Board of Governors has been working diligently since the Committee was created in September with real estate and architectural consultants in developing the Exchange's long-range building requirements and in analyzing possible sites for a new Exchange building in lower Manhattan.

*Background of Program of Tax Reform*

As a part of New York City's tax program, the stock transfer tax was amended by the Legislature in 1966 to impose a temporary two-year surcharge of 25%. At that time, legislative leaders indicated that the stock transfer tax should be studied during the two-year period.

As a result, the stock transfer tax has been the subject of extensive study by the City, State and the securities industry. These studies indicate that the New York securities markets have experienced increasing competitive problems in recent years from regional stock exchanges located in San Francisco, Los Angeles, Chicago, Detroit, Philadelphia and Boston. Some 88% of share trading on these exchanges is in New York Stock Exchange listed securities.

From 1965 through 1967, the volume of trading on the regional exchanges increased by 73.2%. Regional "cross" volume (a transaction on a regional exchange in which the broker finds both the buyer and seller) has increased by 202% in 1965-67. This indicates the loss of business by the New York markets to the regionals. As their volume continues to grow, a snowball effect develops. They become more competitive and are able to take more and more business away from New York. A loss of business to New York securities markets also means a loss of stock transfer tax revenue to New York City.

Economic realities make it impossible for New York City and State to repeal the stock transfer tax which will produce an estimated $229 million in the current City fiscal year. However, the existing law can be amended in such a way as to ease the competitive disadvantage of the tax on New York securities markets and still preserve the revenue from the tax.



Competitive problems are particularly acute in two areas —non-resident investors and large block transactions.

*Non-Resident Individuals*

Customers of the New York securities markets who live and work outside the State pay some 80% of the transfer tax. Some non-residents can and do avoid paying the tax by transacting their securities business outside New York on the regional stock exchanges. The brokerage commission charged by these exchanges is the same as in New York. However, none of the cities or states where the regional exchanges are located imposes a stock transfer tax.

*Large Transactions*

There is also an incentive to avoid the stock transfer tax on large orders. Transactions of 10,000 or more shares on the regional exchanges have increased by 202% in 1965-67.

*Proposal for Tax Reform*

As a result of these studies, the proposal for tax reform has two basic objectives:

1) Retain the revenue from the tax.

2) Minimize the competitive problems for New York securities markets created by the existing law and provide a sound base for future increased tax revenues.

Over a five-year period, the proposed tax reform would:

1) Provide for a 50% reduction from the existing tax rates for non-resident individuals.

2) Set a tax ceiling of $350 per transaction. On a stock selling for $20 or more the maximum shares taxed would be 7000.

No special tax relief is provided for Exchange members or securities broker-dealers.

In essence, the purpose of the bill is to reduce the incentives to avoid the tax by doing business outside the New York markets.

To prevent any revenue loss to New York City, the bill provides for a step-by-step reduction over a five-year period. The following table shows the precentage increase in volume in each fiscal year during the implementation of the tax reform proposals needed to yield the preceding year's revenue. The right hand column shows the estimated stock transfer tax revenue in each year based upon the average annual growth rate in NYSE volume of 12% a year since fiscal 1952-53.

| | *Volume Growth Needed to Yield Preceding Year's Revenue* | *Estimated Tax Revenue* (millions) |
|---|---|---|
| 1967-68 | — | $299 |
| 1968-68 | 2.2% | 251 |
| 1969-70 | 2.7 | 273 |
| 1970-71 | 4.5 | 293 |
| 1971-72 | 6.9 | 307 |
| 1972-73 | 6.2 | 324 |

*Contributions of the Securities Industry to New York*

A healthy securities industry is vital to the economic well-being of New York. A loss of business to the Exchange community means a loss of tax revenue to New York City and State. Equally important is the loss of jobs and other economic benefits.

The following table shows the Exchange Community's contributions to the New York City economy:





*Exchange Community's Importance to the New York City Economy*

**Based on 1966 Data**

| | *Exchange Community* | *Entire N.Y.C.* | *Exchange Community As Percent of N.Y.C.* |
|---|---|---|---|
| Jobs | 50,000 | 3.6 million | 1.4% |
| Payrolls | $748 million | $24.4 billion | 3.1% |
| Office Space Occupied | 6-6.5 mil.sq.ft. | 175 mil.sq.ft. | 3.6% |
| Rentals-Office Space | $45 million | $864 million | 5.2% |
| Real Estate—Taxes* | $8.5 million | $1,519 million** | 0.6% |
| Business Taxes | $17.1 million | $530.0 million | 3.2% |

In addition, the securities industry contributed an estimated $356.5 million in taxes to the City and State in 1967. This makes it one of the largest taxpayers in the State.

* Does not include that portion of rentals attributable to real estate tax costs of lessor.

** City Fiscal Year 1966-67.

*Legislative History*

*Conclusion*

The New York securities industry, particularly the stock exchanges located within the State, have contributed importantly to the economy of the New York City and State and to making New York the financial capital of the world. The securities industry faces a period of tremendous expansion and growth with some 24 million individual shareowners and some 100 million people holding shares indirectly through pension funds and the like. The New York Stock Exchange would like to see the long period of uncertainty that has existed because of the stock transfer tax ended so that we and the entire financial community may move forward for the benefit not only of the securities industry but of the entire State of New York.



## Opinion and Decision of the State of New York Court of Appeals

**BOSTON STOCK EXCHANGE, et al.**
***Appellants***
**v.**
**STATE TAX COMMISSION, et al.**
***Respondents***

**October 21, 1975**

**Roger Pascal, Chicago, Ill., of the Illinois Bar, admitted pro hac vice, Milton H. Cohen and Allan Horwich, Chicago, Ill., for appellants.**

**Louis J. Lefkowitz, Atty. Gen. (Robert W. Bush and Ruth Kessler Toch, Albany, of counsel), for respondents.**

**Adrian P. Burke, Corp. Counsel, New York City (Samuel J. Warms and Robert J. Metzler, II, New York City, of counsel), for the City of New York, amicus curiae.**

**WACHTLER, Judge.**

**Since the turn of the century this State has levied a stock transfer tax (Tax Law, § 270). Recently the law was amended to reduce the tax on sales by nonresidents and to fix a maximum tax on all bulk sales within the State (Tax Law, § 270-a). The appellants, all of whom are stock exchanges located outside New York, seek a judgment declaring section 270-a unconstitutional on the grounds that it denies them equal protection of the laws, and discriminates against interstate commerce in violation of the commerce clause (U.S.Const. art. I, § 8).[1]**

**[1] In the lower courts appellants also argued that the statute violated the privileges and immunities clause (U.S. Const. art. IV, § 2), but that contention has been abandoned on this appeal.**

At Special Term the defendant tax commission unsuccessfully argued that the State courts lacked subject matter jurisdiction, that the appellants lacked standing and that the complaint failed to state a cause of action. The Appellate Division modified, agreeing that the courts had subject matter jurisdiction and that the appellants had the requisite standing to raise the issues but found that the statute did not violate the Constitution as alleged. Accordingly they dismissed the complaint on the merits (45 A.D.2d 365, 357 N.Y.S.2d 116). The order of the Appellate Division should be affirmed.

Section 270 of the Tax Law imposes a tax "on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock". The tax depends on the value of the stock, the maximum tax being 5 cents per share. When the sale is made within the State, the tax may be levied on any of these events, but no more than one of them (20 NYCRR 440.2). When the sale and all the accompanying negotiations occur outside the State—as on one of the appellants' exchanges—no tax is due unless the stock is transferred in New York by a local transfer agent or upon the corporate books (see, e. g., *Matter of Monarch Life Ins. Co. v. State Tax Comm.*, 32 N.Y.2d 850, 346 N.Y.S.2d 272, 299 N.E.2d 684).

The constitutionality of this statute, originally enacted in 1905, has been sustained on several occasions against claims that it violated due process, equal protection (*Hatch v. Reardon*, 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415) and the commerce clause (*O'Kane v. State of New York*, 283 N.Y. 439, 28 N.E.2d 905; cf. *Hatch v. Reardon, supra*). It is now well settled that the commerce clause does not prohibit the States from levying a tax on the transfer of property within the State (*International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 348, 64 S.Ct. 1019, 88 L.Ed. 1313; cf. *Freeman v. Hewit*, 329 U.S. 249, 258, 67 S.Ct. 274, 91 L.Ed. 265). Thus far the parties are agreed—the basic tax is constitutionally valid.



In 1966 complaints reached the Legislature that the transfer tax was driving business from the State. Specifically the New York exchanges complained that although brokers in other States charged the same commissions, transactions on the New York exchanges were placed at a disadvantage because none of the States in which the competing exchanges were located imposed a tax on stock sales or transfers. After extensive investigation the Legislature found that "the tax on transfers * * * is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable" (L.1968, ch. 827). Accordingly the Legislature amended the tax law, adding section 270-a, which reduces the tax by 50% when a nonresident sells stock within the State. And when any shareholder, resident or nonresident, sells a large block of stock within the State, the tax due is limited to a maximum of $350.[2]

[2] These are the rates which are presently applicable. When section 270-a originally went into effect on July 1, 1969, it provided for higher rates—95% for nonresidents, and a maximum tax of $2,500. This was gradually reduced to the current rates which became effective July 1, 1973.

If section 270-a is invalidated, the prior tax scheme would again become effective (L.1968, ch. 827, § 11) and the appellants would be restored to their position of economic superiority.

First we consider the appellants' argument that the statute violates the equal protection clause "because it establishes an arbitrary classification dependent upon the place of sale." The equal protection clause is often invoked in support of a claim that a State taxing scheme is arbitrary. This is a familiar argument and the general principles are well settled.

It has been repeatedly held that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (*Madden v. Kentucky,* 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590) and that the equal protection "clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation" (*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526, 527, 79 S.Ct. 437, 440, 3 L.Ed.2d 480). To succeed on the equal protection argument, the appellants must not only overcome the presumption of constitutionality which attaches to every statute (*Madden v. Kentucky,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590, *supra*) but must also establish that there is no "conceivable state of facts which would support" the classification (*Carmichael v. Southern Coal Co.,* 301 U.S. 495 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245; *Lawrence v. State Tax Comm.,* 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102; *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351). The burden is on the one challenging the statute "to negative every conceivable basis which might support it" (*Madden v. Kentucky, supra,* 309 U.S. at p. 88, 60 S.Ct. at p. 408).





Initially we note, as did the Appellate Division, that the place of sale is not always the determining factor under the statute in question. If a small sale is involved the full tax must be paid unless the seller is a nonresident. Thus the statute also distinguishes between residents and nonresidents in favor of the latter. The avowed purpose, as the legislative history indicates, was to encourage nonresidents to sell on the New York exchanges. Similar legislation has been consistently upheld "and [it] appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment" (*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 528, 79 S.Ct. 437, 441, 3 L. Ed.2d 480).

The Appellate Division also found that the distinction between in-State and out-of-State sales could be justified on the ground that "[t]ransactions made in New York are less susceptible to tax evasion than those made outside" (45 A.D.2d p. 369, 357 N.Y.S.2d p. 120). They found that *Madden v. Kentucky (supra)* supported this conclusion and we agree. In that case the State imposed an *ad valorem* tax of 10 cents per $100 on deposits in local banks, but taxed deposits in out-of-State banks at 50 cents per $100. Although the amount of tax was based on an out-of-State event, the court found that the classification was not arbitrary within the meaning of the equal protection clause since "The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection" (*Madden,* 309 U.S. 83, 90, 60 S.Ct. 406, 409, 84 L.Ed. 590, *supra*).

Here, of course, the Legislature noted that tax evasion was one of the factors which prompted the enactment of section 270-a. But even if their motives had been more subtly stated, or completely unstated, the fact remains that this is a conceivable basis for the distinction. The Legislature, of course, is not required to "record a complete catalogue of the considerations which move its members to enact laws" (*Carmichael,* 301 U.S. 495, 510, 57 S.Ct. 868, 872, 81 L.Ed. 1245, *supra*; see, also, *Lehnhausen,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351, *supra*).

Finally the appellants argue that the distinction between sales made within the State and sales completed elsewhere discriminates against interstate commerce. The commerce clause, of course, imposes additional limitations on the States' taxing powers and "restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax" (*Toomer v. Witsell,* 334 U.S. 385, 406, 68 S.Ct. 1156, 1167, 92 L.Ed. 1460). The question in other words is no longer whether the distinction can be justified by "any conceivable state of facts which could support it" (*Carmichael, supra,* 301 U.S. at p. 509, 57 S.Ct. at p. 872). "The guiding principle which limits the power of the States to tax is that the several States of the Union may not discriminate against interstate commerce in favor of intrastate commerce." (*O'Kane v. State of New York,* 283 N.Y. 439, 446, 28 N.E.2d 905, 908, *supra*; see, also, *Robbins v. Shelby County Taxing Dist.,* 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694; *Welton v. Missouri,* 91 U.S. 275, 23 L.Ed. 347; *Memphis Steam Laundry v. Stone,* 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436; *Nippert v. Richmond,* 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760; *Best & Co. v. Maxwell,* 311 U.S. 454, 61 S.Ct. 334, 85



L.Ed. 275; *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202.)

Here, as indicated, the Legislature found that the tax as originally enacted had the reverse effect in that it conferred an economic advantage on exchanges located outside the State. The appellants do not dispute this. To neutralize this advantage, the Legislature enacted section 270-a and it seems clear that they had the power to do so. A use tax is a familiar example of this type of compensatory legislation and it is well settled that it does not offend the commerce clause (see, e. g., *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 343, 74 S.Ct. 535, 98 L.Ed. 744; cf. *Alaska v. Arctic Maid,* 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227). Thus the stated legislative goal is a valid one.

Although helpful, this is not necessarily controlling for the determinative question in each case is "whether the statute under attack * * * will in its practical operation work discrimination against interstate commerce" (*Best & Co. v. Maxwell,* 311 U.S. 454, 456, 61 S.Ct. 334, 335, 85 L.Ed. 275, *supra*).

The statute should have no practical effect whatsoever on sales by shareholders, both residents and nonresidents, involving stocks which do not have to be transferred in New York. If they sell on a New York exchange, of course they can claim the benefit of section 270-a. But if they sell on one of the appellants' exchanges, they would pay no tax at all. Here the stock transfer law still works to the appellants' economic advantage.

The sale of New York securities poses a different problem. Then the transfer tax must be paid and the amount due depends on whether the sale is made in New York or elsewhere. In the case of New York residents it is more

than likely (cf. *Nippert v. Richmond,* 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760) that the sale would be made on a New York exchange in any event, so that section 270-a should have little or no "practical" effect on such transactions.

The appellants' major argument then is that section 270-a discriminates against interstate commerce by encouraging nonresidents to sell New York securities on New York exchanges. This assumes that such sales would be intrastate so that the practical effect of the statute would be to "discriminate against interstate commerce in favor of intrastate commerce" (*O'Kane,* 283 N.Y. 439, 446, 28 N.E.2d 905, 908, *supra*).

The sale of intangibles is, of course, commerce within the meaning of the commerce clause (*Freeman v. Hewit,* 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265). And we can assume that sales of New York stocks by a nonresident on an out-of-State exchange would nevertheless involve interstate commerce because the securities must ultimately be transferred in New York (but see *Hatch v. Reardon,* 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415, *supra*). But we cannot assume, as the appellants do, that if the nonresident chooses to make the sale in New York—in order to claim the exemption provided by the statute—the transaction would lose its interstate character.

Typical of this latter type of transaction is one in which a resident of one of the areas in which the appellants operate gives his New York broker, or a New York correspondent of a local broker, an order to sell. When, in such a case, the New York broker executes the order, the customer will normally send his stock certificate to the New York broker to fulfill his agreement to sell. Such a sale is not an intrastate transaction. On the contrary in



*Freeman v. Hewit,* 329 U.S. 249, 259, 67 S.Ct. 274, 280, 91 L. Ed. 265, *supra* the Supreme Court considered an identical transaction and concluded "Of course this is an interstate sale". In other words the trouble with the appellants' argument is that a sale by a nonresident on a New York exchange—the type of transaction the law allegedly encourages—is still interstate commerce. Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202, *supra* compels a different result since in that case this precise point was neither argued nor decided.

The order of the Appellate Division should be affirmed.

BREITEL, C. J., and JASEN, GABRIELLI, JONES, FUCHSBERG and COOKE, JJ., concur.

Order affirmed, with costs.

(G-26)



IN THE

# Supreme Court of the United States

October Term, 1975

No. 75-1019

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Appellants,*

*v.*

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Appellees.*

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS.

## MOTION TO DISMISS

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# INDEX.

## CITATIONS.

IN THE

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## MOTION TO DISMISS

### Preliminary Statement

The Appellees, pursuant to Rule 16 of the Rules of this Court, move to dismiss the appeal herein from the order and judgment of the Court of Appeals of the State of New York upon the ground that it is clear that the question sought to be raised is so devoid of merit and so lacking in any substantial federal issue as to require no further argument. There is no conflict with prior decisions of this Court.

In the absence of any substantial federal question, the jurisdiction of this Court is neither conferred by 28 U.S.C.

§ 1257(2), nor by the wholly irrelevant cases erroneously relied upon by appellants which are set forth in their Jurisdictional Statement* (p. 2).

### Question Presented

Whether plaintiffs' out-of-state stock exchanges, not subject to the New York Stock Transfer Tax, are remotely and unconstitutionally discriminated against under the Commerce Clause of the Constitution of the United States (Art. 1, § 8, cl. 3), when such transfer tax, classified for such purpose, has no extra-territorial tax application and (a) is imposed only upon certain stock sales made within the State by non-residents at tax rates lower than those imposed upon like sales made by residents (New York Tax Law, § 270-a(1)), and (b) a reduced but maximum tax is imposed upon statutorily defined large block sales of stock made within the State, whether made by residents or non-residents *(ibid.,* § 270-a(2)), when such tax statute was enacted to protect and preserve the State's securities industry, the State's economy, and the public revenue.

* Since appellants confine their appeal solely to whether the state statute violates the commerce clause of United States Constitution, Art. 1, § 8, cl. 3, jurisdiction herein is not established by reliance upon "*Warren Trading Post Co.* v. *Arizona State Tax Commission,* 380 U. S. 685 (1965); *American Oil Co.* v. *Neill,* 380 U. S. 451 (1965); *Western Turf Association* v. *Greenberg,* 204 U. S. 359 (1907); *Halliburton Oil Well Co.* v. *Reily,* 373 U. S. 64 (1963); *cf. Nippert* v. *Richmond,* 327 U. S. 416 (1946)". In the cases of *Warren Trading* and *American Oil Co., supra,* this Court specifically found it unnecessary to consider any question of unconstitutionality under the commerce clause, 380 U. S. 685, 686, and 380 U. S. 451, 459, respectively. The *Warren* case was decided on the basis of federal statutory preemption over Indian affairs, while *American Oil* was decided solely on the due process clause. The *Western Turf* case was decided only on the grounds that a statute on admissions to a race course did not violate the privilege and immunities, due process, and the equal protection of the laws clauses under the United States Constitution. In the *Nippert* case a state license fee for the solicitation of interstate commerce was held to be an unconstitutional burden on such commerce—not the case here.



The precise question presented, therefore, is certainly not, as incorrectly posed by appellants, whether the statute subjects "transfers or deliveries following an out-of-sale to heavier taxation than those following an in-state sale," since no transfer tax whatever is imposed on out-of-state sales but is imposed only *if* stock is later transferred *within* the State by the local transfer agent or by the corporation whose stock is to be transferred, a purely local incident at the end of the stream of commerce having a sufficient local nexus to justify the transfer tax.*

### Nature of case, statute involved and its administrative implementation

#### A.

#### Nature of Case

The action herein, was initiated in Special Term, Supreme Court, New York County, by plaintiffs' complaint in which it was alleged, *inter alia,* that Tax Law, § 270-a, (New York Laws of 1968, ch. 827, § 4) was unconstitutional upon the grounds that it violated the Constitution of the United States, *viz.* (1) the Commerce Clause in Article 1, § 8, ch. 3 thereof, (2) the privileges and immunities clause in Article 4, § 2 thereof, and (3) the equal protection clause in the Fourteenth Amendment, § 1 thereof, and for injunctive relief to enjoin tax imposition and collection.

* Of course, if appellants prevail, then the taxable status quo is restored to where it was before the enactment of Tax Law, § 270-a, *supra,* by virtue of the New York Laws of 1968, ch. 1. Section 11 thereof requires the re-imposition of the higher rates of taxation imposed by Tax Law, § 270, without distinction between the sales by non-residents or large block sales or transfers within the State. Ch. 827, *supra,* § 10 also provides for the separability of § 270-a in the event of the unconstitutionality of any of its subdivisions so that the others remain viable as enacted.

The defendants opposed the motion for injunctive relief, and moved for dismissal upon the grounds that (a) the Court had no jurisdiction of the subject matter, (b) the plaintiffs lacked legal capacity to sue, since, not subject to tax, they were not legally aggrieved, and had no legal right to question the constitutionality of the statute, and (c) the pleadings failed to state a cause of action.

Special Term, with opinion (not reported officially), denied defendants' motion to dismiss, without passing upon the merits of the statute's constitutionality, and concluded that plaintiffs had legal standing to initiate the action and denied injunctive relief. Upon defendants' appeal to the Supreme Court, Appellate Division, First Judicial Department, that Court, with an unanimous opinion, concurred that plaintiffs possessed standing but modified the order appealed from and granted "defendants' motion to the extent of directing that a judgment be entered declaring that the provisions added to the Tax Law by chapter 827 of the Laws of 1968 are valid and constitutional * * *" (45 A D 2d 365, 370). This constituted a dismissal of the complaint on the merits (37 N Y 2d 535, 541).

Although plaintiffs' notice of appeal to the New York Court of Appeals retained their original constitutional objections, shown above, nonetheless their objections to the alleged violations of the "privileges and immunities" clause of Article 4, § 2, *supra,* were abandoned in their brief upon the appeal to the Court of Appeals (37 N Y 2d 535, 538), as they have now done in their Jurisdictional Statement by abandoning all objections to an alleged denial of "equal protection clause" of the Fourteenth Amendment (Juris. Stm't., p. 3).

The Court of Appeals, in an unanimous opinion, affirmed the order appealed from, concluding that there was no denial of equal protection, nor any violation of the "interstate com-



merce clause" (37 N Y 2d 535). The cause was remitted to Supreme Court, New York County.

## B.

### Statute Involved

1. ***New York Tax Law, as amended by L. 1968, ch. 827:***

"CHAPTER 827*

AN ACT to amend article twelve of the tax law, in relation to rates of the stock transfer tax imposed thereby, their reduction for certain nonresidents, the fixing of maximum taxes on certain transactions subject to tax thereunder, the providing of penalties for violation of certain provisions thereof, and the repeal of subdivision two of section two hundred seventy of such law, as amended by section one of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, relating to rates of tax

Became a law June 16, 1968, with the approval of the Governor. Passed on message of necessity pursuant to article III, section 14 of the Constitution by a majority vote, three-fifths being present

* NOTE.—Subdivision two of section two hundred seventy of the tax law, as amended by section one of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, proposed to be repealed by this act provided for a twenty-five percent increase in the rate of tax prevailing before July first, nineteen hundred sixty-six. Such subdivision two by reason of the provisions of section three of such chapter seven hundred seventy-one, was to remain in force and effect only until June thirtieth, nineteen hundred sixty-eight. The continuation of the increased rate is sought to be achieved by section three of this act which amends subdivision two of section two hundred seventy of the tax law, as last amended by section two of such chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, and which, by the provisions of section three of such chapter is to take effect July first, nineteen hundred sixty-eight. The continuation of increased rates is achieved by restoring to such subdivision two, the language deleted from it by section two of such chapter seven hundred seventy-one.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Legislative findings. The legislature hereby finds that: The securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable.

§ 2. Subdivision two of section two hundred seventy of the tax law, as amended by section one of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, is hereby repealed.

§ 3. Subdivision two of section two hundred seventy of such law, as last amended by section two of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

2. *Except as otherwise provided by section two hundred seventy-a of this chapter,* [The] *the* tax imposed by this section shall be two *and one-half* cents for each share, except in cases where the shares or certificates are sold, in which cases the tax shall be at the rate of one [cent] *and*

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.



*one-quarter cents* for each share where the selling price is less than five dollars per share; two *and one-half* cents for each share where the selling price is five dollars or more per share and less than ten dollars per share; three *and three-quarters* cents for each share where the selling price is ten dollars or more per share and less than twenty dollars per share and [four] *five* cents for each share where the selling price is twenty dollars or more per share.

§ 4. Such law is hereby amended by adding thereto a new section to be section two hundred seventy-a, to follow section two hundred seventy and to read as follows:

*§ 270-a. Rates for nonresidents; maximum amounts of tax; penalties. 1. Notwithstanding the provisions of section two hundred seventy of this chapter on and after July first, nineteen hundred sixty-nine, the rates of tax set forth in paragraph (a) of this subdivision and the maximum amounts of tax set forth in subdivision two of this section shall apply, in the case of those sales made within this state subject to tax under section two hundred seventy and described in paragraph (a) of this subdivision and subdivision two of this section.*

*(a) On such sales by a nonresident during the periods set forth in the following table, the rates of tax shall be the percentages, set forth in such table, of the rates of tax provided in section two hundred seventy of this article:*

| *Period* | *Percentage of Rates of Tax Provided in Section two hundred seventy of this article* |
|---|---|
| *July 1, 1969 to June 30, 1970 .....* | *95%* |
| *July 1, 1970 to June 30, 1971 .....* | *90%* |
| *July 1, 1971 to June 30, 1972 .....* | *80%* |
| *July 1, 1972 to June 30, 1973 .....* | *65%* |
| *July 1, 1973 and thereafter.........* | *50%* |

*The tax so calculated shall not be carried out in its computation beyond four decimal points, that is, it shall be computed to the nearest one one-hundredth of one cent.*

* * *"

[BLOCK SALES]

*"2. Where any sale made within the state and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale shall not exceed, during the period beginning on July first, nineteen hundred sixty-nine and ending on June thirtieth, nineteen hundred seventy, the sum of two thousand five hundred dollars; during the period beginning on July first, nineteen hundred seventy and ending on June thirtieth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending on June thirtieth, nineteen hundred seventy-two, the sum of seven hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-two and ending on June thirtieth, nineteen hundred seventy-three, the sum of five hundred dollars; and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars; provided, however, that sales made within this state by any member of a securities exchange or by any registered dealer, who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter to pay the taxes imposed by this article without the use of the stamps prescribed by this article, pursuant to one or more orders placed with the same member of a securities exchange or the same registered dealer on one day, by the same person, each relating to shares or certificates of the same class and issued by the same issuer, all of which sales are executed on the same day (regardless of whether it be the day of the placing of the orders), shall, for the purposes of this subdivision two, be considered to constitute a single taxable sale.*

* * *"

**"§ 10. If any section of this act, or the repeal, amendment, or change made by any such section to any item, clause, sentence, sub-paragraph, paragraph, subdivision, section or other part of article twelve of the tax law, or the application thereof to any person or circumstances,**



**shall be held to be invalid, such holding shall not affect, impair or invalidate the remainder of this act or any other item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, or the application of such section of this act or such section or part of a section of such article twelve of the tax law held invalid, to any other person or circumstances, but shall be confined in its operation to the section of this act or the item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, directly involved in such holding, or to the person and circumstances therein involved.**

**§ 11. In the event that section four of this act or subdivision one or two of section two hundred seventy-a of the tax law as added thereto by such section four, shall be held to be invalid by reason of unconstitutionality, whether federal or state, then in either of such events, in the case of such subdivision one, the rates of tax provided by section two hundred seventy of the tax law, as amended by this act, shall be deemed to have applied and shall apply to resident individuals and nonresident individuals alike, and in the case of such subdivision two, the rates of tax provided for by section two hundred seventy of the tax law as amended by this act shall be deemed to have applied and shall apply to all transactions subject to the tax imposed by article twelve of the tax law, without any limitations as to the maximum amounts of tax due on any such transactions.**

**§ 12. If any provision of this act or of the sections of the tax law amended by this act, is inconsistent with, in conflict with, or contrary to any other provision of law, such provision of this act or section of such tax law shall prevail over such other provision and such other provision shall be deemed to have been amended, superseded or repealed to the extent of such inconsistency, conflict or contrariety.**

**§ 13. This act shall take effect July first, nineteen hundred sixty-nine, except sections one, two and three**

thereof which shall take effect July first, nineteen hundred sixty-eight."

2. *Legislative History:*

Chapter 827, *supra,* including its legislative findings, was the result of two years of negotiation between the New York Stock Exchange, the City of New York, legislative leaders and the State administration (Rec. 48-49)* to induce this Exchange to remain in the City of New York, "and to making New York the financial center of the world", to bolster the securities industry, to preserve and protect the economy, and the public revenue, and to meet the competition from out-of-state exchanges (48, 49-54). The statement of the New York Stock Exchange with respect to the necessity for the enactment of chapter 827 and the financial contribution by the securities industry to the economy of the City and State of New York appears at pages 49-54 of the Record (Appendix A hereto).

As to the need for the reduced tax imposed by section 270-a(1), *supra,* on sales made by non-residents the Exchange reported (51):

"Non-Resident Individuals

"Customers of the New York securities markets who live and work outside the State pay some 80% of the transfer tax. Some non-residents can and do avoid paying the tax by transacting their securities business outside New York on the regional stock exchanges. The brokerage commission charged by these exchanges is the same as in New York. However, none of the cities or states where the regional exchanges are located imposes a stock transfer tax."

As to the need for special provisions pertaining to the sales of large blocks of stock (§ 270-a(2), *supra*), the Exchange also reported (51-52):

* Page references are to the Record before the Court of Appeals.



"Large Transactions

"There is also an incentive to avoid the stock transfer tax on large orders. Transactions of 10,000 or more shares on the regional exchanges have increased by 202% in 1965-67.

"Proposal for Tax Reform

"As a result of these studies, the proposal for tax reform has two basic objectives:

"1) Retain the revenue from the tax.

"2) Minimize the competitive problems for New York securities markets created by the existing law and provide a sound base for future increased tax revenues.

"Over a five-year period, the proposed tax reform would:

"1) Provide for a 50% reduction from the existing tax rates for non-resident individuals.

"2) Set a tax ceiling of $350 per transaction. On a stock selling for $20 or more the maximum shares taxed would be 7000.

"No special tax relief is provided for Exchange members or securities broker-dealers.

"In essence, the purpose of the bill is to reduce the incentives to avoid the tax by doing business outside the New York markets.

* * *"

Executive approval of chapter 827 was accompanied by the Governor's memorandum of approval which expresses the legislative findings, intent and purpose of the enactment, in part as, follows (48-49):

*"On approving L.1968, c.827, which continues the present stock transfer tax rates until July 1, 1969, the Governor stated:*

*June 16, 1968*

"* * *

"Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry to one of national and international scope. While the bulk of stock transfers still funnels through New York, only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State where more than 90 percent of trading is in securities listed on the New York Stock Exchange. The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.

"The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and will provide long-term relief from some of the competitive pressures from outside the State.

"As a result of adoption of the revisions of the stock transfer tax contained in this bill, the New York Stock Exchange has announced that it intends to remain and expand in New York and is now studying sites for a new exchange building in downtown Manhattan. The Exchange's action augurs well for the future growth of New York as the Nation's financial center and acknowledges the confidence of the industry in the ability of city government and the legislature to recognize the industry's problems and to commit themselves to a long-term course for the benefit of all.

"The bill is approved.

Nelson A. Rockefeller"



**C.**

**Administrative Implementation**

**Detailed administrative regulations have been promulgated with respect to the construction and application of the Stock Transfer Tax, including those under section 270-a, *supra.* They appear in *New York Codes, Rules and Regulations,* vol. 20, Taxation and Finance, §§ 440.1 *et seq.* In addition to these regulations, counsel to the Tax Department rendered an opinion, dated September 1, 1970 (see e.g. *C.C.H. New York Tax Service,* vol. 2, ¶ 57-401a), which sets forth more precise examples than do appellants (Juris. Stmt., pp. 7-8) concerning the imposition of the tax upon sales by non-residents and large block sales. This opinion appears as Appendix B hereto.**

## ARGUMENT

**The reduced tax rates imposed by the stock transfer tax upon stock sales in New York neither burden nor discriminate against interstate commerce under the commerce clause and no substantial federal question exists.**

**A. No Constitutional Infirmity Exists.**

**Appellants' constitutional objections to the reduced tax rates afforded by Tax Law, § 270-a upon sales in New York to both non-residents and to the sales of large block shares of stock, whether by residents or not, are devoid of merit. As noted below (37 N Y 2d 535, 540): "If section 270-a is invalidated, the prior tax scheme would again become effective (L. 1968 ch. 827, § 11) and the appellants would be restored to their position of economic superiority". However, the former tax scheme, of course, was sustained by this Court long ago against the very claim, as made here, that the stock transfer tax imposed an unconstitutional burden upon interstate com-**

merce upon transfers of stock made in New York (*Hatch* v. *Reardon*, 204 U. S. 152 [1906]; see also *O'Kane* v. *State of New York*, 283 N.Y. 439 [1940]; *cf. Freeman* v. *Hewitt*, 329 U.S. 249 [1946]).

The present tax is neither a burden upon nor a discrimination against interstate commerce within the meaning of the Commerce Clause. Quite the contrary, the reduced tax rates erect no barrier against the free flow of commerce, since they are intended and designed in *favor* of such commerce by encouraging the occurrence of stock transactions involving non-residents in the State of New York. The statute imposes no prohibition upon or restriction against the sales of stock upon any securities exchange and a seller of stock is free, at his option, to sell wherever the stock is listed. If sold outside New York, the transfer tax is imposed under Tax Law, § 270, *supra*, and at a higher rate *only* if "*** the stock is transferred in New York by a local transfer agent or upon the corporate books", as noted below (37 N Y 2d 535, 539). In such case, the taxable event is dependent upon the fortuitous circumstance of the location of the transfer agent or the corporate books within New York, even though no other State imposes a similar tax. If sold and transferred elsewhere, then no tax is or can be imposed by New York. Accordingly, the location of either the transfer agent or the corporate books within New York constitutes sufficient nexus to justify the tax in return for the services, protection, and facilities afforded by the State and its subdivisions*, since, as noted below, "It is

* After defraying administrative costs of the transfer tax, its entire revenue is payable into the special account for the Municipal Assistance Corporation for the City of New York for the repayment of the City's obligations to the Corporation and the surplus is paid into the general fund of the City of New York for the support of local government pursuant to State Finance Law, §92-b (L. 1965, ch. 91, as amended by L. 1966, ch. 3, L. 1969, ch. 768 and L. 1975, ch. 768, § 7). This is in complete accord with the principle that "interstate commerce bear its proper share of the costs of local government in return for the benefits received." *(Mich-Wis. Pipeline Co. v. Calvert*, 374 U.S. 157, 166 (1954)).



now well settled that the Commerce Clause does not prohibit the States from levying a tax on the transfer of property within the State (*Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 348; cf. *Freeman* v. *Hewitt*, 329 U.S. 249, 258)."(37 N Y 2d 535, 539). After all, the transfer tax is imposed as the result of a local incident at the end of interstate commerce and is not unlike a sales tax imposed on a transfer of property at the end of such commerce (see *e.g. McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 [1940]), or an ad valorem property tax at the end of foreign commerce (*Michelin Tire Corp.* v. *Wages, Tax Commissioner, et al.*, .... U.S. ...., decided January 14, 1976). This latter case also disposes of appellants' erroneous contention that section 270-a, *supra*, imposes an "import" or "customs duty" (Juris. Stmt., p. 19). Neither the Commerce Clause nor the Export-Import Clause were ever intended, nor do they provide for the impairment of a State's valid tax policies enacted, as here, within its constitutional authority under the Tenth Amendment to the Constitution.

The Court of Appeals correctly disposed of appellants' constitutional objections under the Commerce Clause, as follows (37 N Y 2d 535-543):

> "Here, as indicated, the Legislature found that the tax as originally enacted had the reverse effect in that it conferred an economic advantage on exchanges located outside the State. The appellants do not dispute this. To neutralize this advantage, the Legislature enacted section 270-a and it seems clear that they had the power to do so. A use tax is a familiar example of this type of compensatory legislation and it is well settled that it does not offend the commerce clause (see, e.g., *Miller Bros. Co. v. Maryland*, 347 US 340, 343; cf. *Alaska v. Arctic Maid*, 366 US 199). Thus the stated legislative goal is a valid one.
>
> Although helpful, this is not necessarily controlling for the determinative question in each case is 'whether the statute under attack *** will in its practical operation

work discrimination against interstate commerce' *(Best & Co. v. Maxwell,* 311 US 454, 456, *supra*).

The statute should have no practical effect whatsoever on sales by shareholders, both residents and nonresidents, involving stocks which do not have to be transferred in New York. If they sell on a New York exchange, of course they can claim the benefit of section 270-a. But if they sell on one of the appellants' exchanges, they would pay no tax at all. Here the stock transfer law still works to the appellants' economic advantage.

The sale of New York securities poses a different problem. Then the transfer tax must be paid and the amount due depends on whether the sale is made in New York or elsewhere. In the case of New York residents it is more than likely (cf. *Nippert v. Richmond,* 327 US 416) that the sale would be made on a New York exchange in any event, so that section 270-a should have little or no 'practical' effect on such transactions.

The appellants' major argument then is that section 270-a discriminates against interstate commerce by encouraging nonresidents to sell New York securities on New York exchanges. This assumes that such sales would be intrastate so that the practical effect of the statute would be to 'discriminate against interstate commerce in favor of intrastate commerce' *(O'Kane,* 283 NY 439, 446, *supra*).

The sale of intangibles is, of course, commerce within the meaning of the commerce clause (*Freeman v. Hewit,* 329 US 249). And we can assume that sales of New York stocks by a nonresident on an out-of-State exchange would nevertheless involve interstate commerce because the securities must ultimately be transferred in New York (but see *Hatch v. Reardon,* 204 US 152, *supra*). But we cannot assume, as the appellants do, that if the nonresident chooses to make the sale in New York—in order to claim the exemption provided by the statute—the transaction would lose its interstate character.



Typical of this latter type of transaction is one in which a resident of one of the areas in which the appellants operate gives his New York broker, or a New York correspondent of a local broker, an order to sell. When, in such a case, the New York broker executes the order, the customer will normally send his stock certificate to the New York broker to fulfill his agreement to sell. Such a sale is not an intrastate transaction. On the contrary in *Freeman v. Hewit* (329 US 249, 259, *supra*) the Supreme Court considered an identical transaction and concluded 'Of course this is an interstate sale'. In other words the trouble with the appellants' argument is that a sale by a nonresident on a New York exchange—the type of transaction the law allegedly encourages—is still interstate commerce. Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co. v. Reily* (373 US 64, *supra)* compels a different result since in that case this precise point was neither argued nor decided."

### B. Inapplicability of Appellants' citations.

Appellants concede in their Jurisdictional Statement that New York has the "authority to tax the transfer, delivery and sale of securities which occur in-state." (p. 14). This concession leaves them in a state of limbo in a constitutional sense, since there is nothing else left to complain about. Despite this, their present complaint now runs to the specious argument that, while no extra-territorial tax is imposed upon them or upon any transaction conducted upon their exchanges, the tax discriminates against their "business", rather than against "commerce", by the favorable tax inducements offered by New York and assert that the Court of Appeals erred in failing to consider this aspect so as to warrant review by this Court.* This is a new point not raised below, so Court

* It should be noted that despite the enactment of ch. 827, *supra*, effective on January 1, 1969 (§ 13), the volume of trading on appellants' exchanges were hardly affected by ch. 827, as reported by the Securities Exchange Commission as shown in its 1973, 39th Annual Report, p. 155, which was before the Court below and which is reproduced hereto as Appendix C.

could not have "failed to consider it", and is not properly before this Court (see *e.g., Wilson* v. *Cook,* 327 U. S. 474, 483-484 [1946]; *Lear, Inc.* v. *Adkins,* 395 U. S. 653, 680 [1968]; *cf. Cardinale* v. *Louisiana,* 394 U. S. 437, 438 [1969]).

The sole question is the constitutionality of the tax as applied in New York to transactions occurring there and nowhere else. After all, New York is not required to permanently retain its tax structure as originally enacted when, as here, such structure requires modification to meet changing economic conditions of the market place within its own constitutional sphere of authority, as the legislative history of Tax Law, § 270-a, *supra,* clearly demonstrates. As a matter of fact, the Court of Appeals rejected appellants' argument for a return to "economic superiority" under present circumstances, as noted above (35 NY 2d 535, 540). As this Court has stated: "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *(Seagram and Son* v. *Hostetter,* 384 U. S. 35, 43, citing cases [1965], rearg. den., *ibid,* 967). In other words, when a State acts constitutionally within its borders for its own economic interests, "Certainly this Court will not interpose its own economic views or guesses when the State has made its choice." (*cf. e.g. Safeway Stores* v. *Oklahoma Grocers,* 360 U. S. 334, 341 [1958]; see also *Mich.-Wis. Pipeline Co.* v. *Calvert,* 347 U. S. 157, 166, *supra*). This is precisely the situation here.

The fundamental weakness of appellants' specious contentions stems from the failure to heed the warnings of this Court pertaining to the guidelines for constitutional interpretation, by the citation of irrelevant cases, a misreading thereof, and by generalized extractions therefrom wholly out of context and which upon analysis upon their facts and law have absolutely no application to the precise issue here, *viz.*:



> "We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations excluding the concrete circumstances which they profess to summarize." *(Wisconsin* v. *J. C. Penny Co.,* 311 U. S. 435, 445 [1940]).

and stated somewhat differently:

> "Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as a product of preoccupation with their special facts." *(Freeman* v. *Hewitt, supra,* 329 U. S. 249, 252 [1946], rehrg. den. 329 U.S. 832).

These guidelines have been consistently followed by this Court (see, *e.g., Michelin Tire Corp.* v. *Wages, Tax Commissioner, et al., supra,* ..... U. S. ....., [Jan. 1976]) and by the Court below (see, *e.g., Shapiro* v. *City of New York,* 32 N Y 2d 96, 108 [1973], app. dsm. for want of a substantial federal question, 414 U. S. 804, rehrg. den. at p. 1087), and, indeed, in this very case when the Court of Appeals concluded:

> "Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co.* v. *Reily* (373 U. S. 64, *supra*) compels a different result, since in that case this precise point was neither argued nor decided." (37 N Y 2d 535, 543).

It is for these reasons that appellants' erroneous citations are irrelevant and inapplicable here. The opinions in *Freeman* v. *Hewitt, supra,* 329 U. S. 249 (1946), clearly isolates and disposes of, as inapplicable to the circumstances here, the earlier cases of *Welton* v. *Missouri,* 91 U. S. 275 (1875); *Guy* v. *Baltimore,* 100 U. S. 434 (1879); *Robbins* v. *Shelby Taxing District,* 120 U. S. 489 (1886); *Best & Co.* v. *Maxwell,* 311 U. S. 454 (1940), and *Nippert* v. *Richmond,* 327 U. S. 416 (1945). All five cases, of course, were concerned solely with *license* fees

or a *privilege* tax required or imposed in order to engage in commerce, clearly violative of the Commerce Clause under their circumstances. The reliance upon the later case of *Halliburton Oil Well Co.* v. *Reily, supra,* 373 U. S. 64, is similarly misplaced, as noted above, because that case, too, is not in point. There the state tax was found to be a discrimination against a competitive taxpayer and, therefore, interstate commerce because it treated the foreign taxpayer therein differently and unfairly from the domestic taxpayer in the imposition of the sales and use taxes upon like equipment and with tax exemptions to the domestic taxpayer which were denied to the out-of-state taxpayer.

Similarly inapplicable are the cases of *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U. S. 389 (1952), and *Miller Brothers Co.* v. *Maryland,* 347 U.S. 340 (1954), since in the former a privilege tax upon an out-of-state vendor for soliciting orders was held void, and in the latter, a use tax upon the mere possession of goods in transit was held void upon an out-of-state vendor who was not within the taxing jurisdiction.

Even more remote to the present issue are appellant's citations dealing with the State's various regulatory efforts over the milk industry and its prices involved in *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U. S. 511 (1935); *H. P. Hood & Sons* v. *DuMond,* 336 U. S. 525 (1949); *Dean Milk Co.* v. *Madison,* 340 U. S. 349 (1951); and *Polar Ice Cream & Creamery Co.* v. *Andrews,* 375 U. S. 361 (1964); or the regulation of the packaging of in-state farm products destined for interstate shipment in *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137 (1970), or the regulation of the interstate shipment of shrimp or oysters in *Foster-Fountain Packaging Co.* v. *Haydel,* 278 U. S. 1 (1928) and in *Johnson* v. *Haydel,* 278 U. S. 16 (1928), respectively.

Lastly, appellants' reliance upon New York citations deal solely with New York procedural law and, of course, have no present application here (Juris. Stm't., p. 16).



## CONCLUSION

**Wherefore, appellees respectfully submit that the federal constitutional questions upon which appellants' argument depends are so unsubstantial as not to warrant consideration by this Court, and appellees respectfully move this Court to dismiss this appeal.**

Dated: Feb. 13, 1976

Respectfully submitted,

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## APPENDIX A

### Report of the New York Stock Exchange.

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### STATEMENT OF ROBERT W. HAACK, PRESIDENT OF THE NEW YORK STOCK EXCHANGE ON THE AMENDMENTS TO THE NEW YORK STOCK TRANSFER TAX.

(A. 6394 and S..........)

March 4, 1968

Bills amending the New York Stock Transfer Tax Law have been introduced in both the Assembly and the Senate. These bills (A. 6394 and S..........) represent the product of many months of discussion with City and State officials. In our opinion, this program of reform of the New York stock transfer tax is a significant example of government and business working together to propose solutions to mutual problems by joint discussion and joint effort.

These bills recognize the financial needs of the City as well as the competitive problems of the New York securities markets by providing for a five-year step-by-step tax reform program which will result in no loss of tax revenue to New York City. In fact, it is estimated that the revenues from the tax would continue to increase.

Trusting favorable consideration of this program of tax reform by the legislature and Governor Rockefeller, the Board of Governors of the New York Stock Exchange has decided that the Exchange will stay in New York City.

As a matter of fact, the Facilities Committee of the Exchange's Board of Governors has been working diligently since the Committee was created in September with real estate and





architectural consultants in developing the Exchange's long-range building requirements and in analyzing possible sites for a new Exchange building in lower Manhattan.

*Background of Program of Tax Reform*

As a part of New York City's tax program, the stock transfer tax was amended by the Legislature in 1966 to impose a temporary two-year surcharge of 25%. At that time, legislative leaders indicated that the stock transfer tax should be studied during the two-year period.

As a result, the stock transfer tax has been the subject of extensive study by the City, State and the securities industry. These studies indicate that the New York securities markets have experienced increasing competitive problems in recent years from regional stock exchanges located in San Francisco, Los Angeles, Chicago, Detroit, Philadelphia and Boston. Some 88% of share trading on these exchanges is in New York Stock Exchange listed securities.

From 1965 through 1967, the volume of trading on the regional exchanges increased by 73.2%. Regional "cross" volume (a transaction on a regional exchange in which the broker finds both the buyer and seller) has increased by 202% in 1965-67. This indicates the loss of business by the New York markets to the regionals. As their volume continues to grow, a snowball effect develops. They become more competitive and are able to take more and more business away from New York. A loss of business to New York securities markets also means a loss of stock transfer tax revenue to New York City.

Economic realities make it impossible for New York City and State to repeal the stock transfer tax which will produce an estimated $229 million in current City fiscal year.

However, the existing law can be amended in such a way as to ease the competitive disadvantage of the tax on New York securities markets and still preserve the revenue from the tax.

Competitive problems are particularly acute in two areas—non-resident investors and large block transactions.

*Non-Resident Individuals*

Customers of the New York securities markets who live and work outside the State pay some 80% of the transfer tax. Some non-residents can and do avoid paying the tax by transacting their securities business outside New York on the regional stock exchanges. The brokerage commission charged by these exchanges is the same as in New York. However, none of the cities or states where the regional exchanges are located imposes a stock transfer tax.

*Large Transactions*

There is also an incentive to avoid the stock transfer tax on large orders. Transactions of 10,000 or more shares on the regional exchanges have increased by 202% in 1965-67.

*Proposal for Tax Reform*

As a result of these studies, the proposal for tax reform has two basic objections;

1) Retain the revenue from the tax.

2) Minimize the competitive problems for New York securities markets created by the existing law and provide a sound base for future increased tax revenues.

Over a five-year period, the proposed tax reform would:

1) Provide for a 50% reduction from the existing tax rates for non-resident individuals.



2) Set a tax ceiling of $350 per transaction. On a stock selling for $20 or more the maximum shares taxed would be 7000.

No special tax relief is provided for Exchange members or securities broker-dealers.

In essence, the purpose of the bill is to reduce the incentives to avoid the tax by doing business outside the New York markets.

To prevent any revenue loss to New York City, the bill provides for a step-by-step reduction over a five-year period. The following table shows the percentage increase in volume in each fiscal year during the implementation of the tax reform proposals needed to yield the preceding year's revenue. The right hand column shows the estimated stock transfer tax revenue in each year based upon the average annual growth rate in NYSE volume of 12% a year since fiscal 1952-53.

| | *Volume Growth Needed to Yield Preceding Year's Revenue* | *Estimated Tax Revenue* (millions) |
|---|---|---|
| 1967-68 | — | $229 |
| 1968-68 | 2.2% | 251 |
| 1969-70 | 2.7 | 273 |
| 1970-71 | 4.5 | 293 |
| 1971-72 | 6.9 | 307 |
| 1972-73 | 6.2 | 324 |

*Contributions of the Securities Industry to New York*

A healthy securities industry is vital to the economic well-being of New York. A loss of business to the Exchange community means a loss of tax revenue to New York City and State. Equally important is the loss of jobs and other economic benefits.

*Appendix A—Report of the New York Stock Exchange.*

The following table shows the Exchange Community's contributions to the New York City economy:

*Exchange Community's Importance to the New York City Economy*

Based on 1966 Data

| | *Exchange Community* | *Entire N.Y.C.* | *Exchange Community As Percent of N.Y.C.* |
|---|---|---|---|
| Jobs | 50,000 | 3.6 million | 1.4% |
| Payrolls | $748 million | $24.4 billion | 3.1% |
| Office Space Occupied | 6-6.5 mil.sq.ft. | 175 mil.sq.ft. | 3.6% |
| Rentals-Office Space | $45 million | $864 million | 5.2% |
| Real Estate—Taxes* | $8.5 million | $1,519 million** | 0.6% |
| Business Taxes | $17.1 million | $530.0 million | 3.2% |

* Does not include that portion of rentals attributable to real estate tax costs of lessor.

** City Fiscal Year 1966-67.

In addition, the securities industry contributed an estimated $356.5 million in taxes to the City and State in 1967. This makes it one of the largest taxpayers in the State.

*Conclusion*

The New York securities industry, particularly the stock exchanges located within the State, have contributed importantly to the economy of the New York City and State and to making New York the financial capital of the world. The





**securities industry faces a period of tremendous expansion and growth with some 24 million individual shareowners and some 100 million people holding shares indirectly through pension funds and the like. The New York Stock Exchange would like to see the long period of uncertainty that has existed because of the stock transfer tax ended so that we and the entire financial community may move forward for the benefit not only of the securities industry but of the entire State of New York.**

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**APPENDIX B.**

**Opinion of Counsel of New York Department of Taxation and Finance.**

**"STATE OF NEW YORK DEPARTMENT OF TAXATION AND FINANCE**

**September 1, 1970**

**"Best, Counsel.—Chapter 827 of the Laws of 1968 amended the stock transfer tax imposed by Article 12 of the Tax Law by adding to it a new section 270-a to make two basic changes in the stock transfer tax. First, it provides a lower rate of tax on sales made in New York State by a nonresident, and, second, it provides a maximum limit on the amount of tax on any single sale made in the State by either a resident or a nonresident. In each of these instances, the basic requirement is that the sale of the stocks must be made in the State of New York.**

**"Where a sale of stocks by a nonresident is made outside of the State of New York, any agreement to sell, any memorandum or contract to sell, any delivery, and any record of**

transfer on the books of the corporation or its transfer agent made in the State of New York subjects the transaction to the stock transfer tax at the rates prescribed in subdivision 2 of section 270 of the Tax Law.

"Following are two examples of illustrative situations:

"(1) X, a nonresident of the State of New York (as defined in paragraph (b) of subdivision 1 of section 270-a), sells shares of stocks through his broker on a securities exchange located outside of the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. The record transfer of the shares made by the transfer agent in New York State is subject to the rate of tax prescribed by subdivision 2 of section 270 of the Tax Law, rather than the lower tax prescribed by paragraph (a) of subdivision 1 of section 270-a as the sale was not made in the State of New York.

"(2) X, a nonresident of the State of New York, sells shares of stocks through his broker on a securities exchange located in the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. The sale of the stocks having been made in the State of New York by a nonresident the lower rate of tax prescribed by section 270-a is applicable.

"With respect to the maximum limit on the amount of tax on a single sale (as defined in subdivision 2 of section 270-a), the maximum limit applies only if the sale is made in the State of New York.



"Following are two examples of illustrative situations:

"(3) X orders his broker to sell 100,000 shares of stock of the same class of Y Corporation. The broker either on the same day or on a later day makes a sale of these shares to a single purchaser on a securities exchange located outside the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. As the sale of the stock was made on a securities exchange located outside the State of New York, the sale of these shares was made outside the State of New York, and the transfer to be made by the transfer agent in the State of New York is subject to the rate of tax prescribed by subdivision 2 of section 270 of the Tax Law.

"(4) X orders his broker to sell 500,000 shares of stock of the same class of Y Corporation. The broker, who is a member of the securities exchange located in the State of New York on the same day or on a later day sells on such exchange 250,000 shares to one purchaser, and 250,000 shares to another purchaser. Both sales are made on the same day. As both sales in this example fall within the definition of a single taxable sale, as defined in subdivision 2 of section 270-a, and as both sales were made on a securities exchange located in the State of New York, the sales were made in the State of New York, and the maximum limit on the amount of tax as prescribed in subdivision 2 of section 270-a applies.

"The maximum limit on the amount of tax on a single taxable sale applies to a sale made within the State of New York by either a resident or nonresident.

*Appendix C—39th Annual Report of the Securities and Exchange Commission, 1973, p. 155.*

"The sole purpose of this opinion is to emphasize that the provisions of section 270-a of the Tax Law are applicable only where the sale of stocks is made in the State of New York. It is not intended to be an opinion of Counsel as to the definition of a single taxable sale."

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## APPENDIX C.

### 39th Annual Report of the Securities and Exchange Commission, 1973, p. 155.

"Table 14*

SHARE VOLUME BY EXCHANGES

| * * * | *Share Sales* | *NYS* | *AMS* | *MSE* | *PCS* | *PBS* | *BSE* | *DSE* | *CIN* | *Other* |
|---|---|---|---|---|---|---|---|---|---|---|
| 1969 .. | 5,134,994,769 | 63.16 | 27.61 | 2.86 | 3.48 | 1.26 | .51 | .12 | .01 | .99 |
| 1970 .. | 4,834,427,929 | 71.29 | 19.03 | 3.16 | 3.68 | 1.63 | .52 | .11 | .02 | .56 |
| 1971 .. | 6,172,103,700 | 71.34 | 18.43 | 3.53 | 3.72 | 1.92 | .43 | .18 | .03 | .44 |
| 1972 .. | 6,506,114,407 | 70.61 | 18.26 | 3.55 | 4.14 | 2.22 | .59 | .15 | .04 | .45 |

"DOLLAR VOLUME BY EXCHANGES

| * * * | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 1969 .. | 176,389,759 | 73.49 | 17.60 | 3.39 | 3.13 | 1.46 | .67 | .12 | .01 | .13 |
| 1970 .. | 131,710,176 | 78.45 | 11.11 | 3.76 | 3.81 | 2.00 | .68 | .11 | .03 | .05 |
| 1971 .. | 186,374,651 | 79.07 | 9.98 | 3.99 | 3.79 | 2.29 | .59 | .19 | .05 | .94 |
| 1972 .. | 205,547,385 | 77.93 | 10.40 | 4.10 | 3.95 | 2.57 | .76 | .18 | .05 | .06" |

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* Source: 1973, *39th Annual Report of the Securities and Exchange Commission*, p. 155.

IN THE

# Supreme Court of the United States

October Term, 1975

**No. 75-1019**

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Appellants*

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Appellants.*

On Appeal From The State of New York Court of Appeals

## BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

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## BRIEF IN OPPOSITION TO MOTION TO DISMISS

The Motion to Dismiss filed by Defendants-Appellees (hereinafter referred to as "defendants") fails to counter the arguments in the Jurisdictional Statement that this Court has jurisdiction under 28 U.S.C. § 1257(2) and that the question presented is substantial.

## I. THE MOTION TO DISMISS MISSTATES THE QUESTION PRESENTED BY THIS APPEAL.

The question presented is not, as defendants assert, whether New York State has the constitutional power to impose a tax on the sale, transfer or delivery of securities within the state. As plaintiffs-appellants (hereinafter referred to as "plaintiffs") stated in their Jurisdictional

Statement, this authority has never been contested and is not in issue in this case.[1] The question that *is* presented is whether the State of New York may constitutionally maintain a tax scheme, the purpose and effect of which is "to protect and preserve the State's securities industry, the State's economy, and the public revenue" (Motion to Dismiss, p. 2) by discriminating against stock exchanges located outside of New York in favor of stock exchanges located in New York.

Defendants' misstatement of the question presented by this appeal undoubtedly accounts for their heavy reliance on *Freeman* v. *Hewitt,* 329 U.S. 249 (1946), for that case dealt only with the jurisdictional power of a state to tax an interstate sale of securities, an issue plaintiffs at no point have raised. Thus, *Freeman* v. *Hewitt* does not "dispose of" the cases plaintiffs cite in the Jurisdictional Statement (Motion to Dismiss, p. 19). Each of those cases assumes the authority of a state to tax the local incident of interstate commerce; the question they address is whether an otherwise permissible tax so discriminates against out-of-state businesses in favor of in-state businesses that it violates the commerce clause of the United States Constitution. That is precisely the issue presented by the present appeal.

Defendants' misstatement of the question presented must also account for their assertion that *Halliburton Oil Well Co.* v. *Reily,* 373 U.S. 64 (1963) is not in point. (Motion to Dismiss, p. 20) Rather than not being in point, *Halliburton* should control the result in this case. There, as here, persons performing two activities in-state (there, manufacture and use; here, sale and transfer) were taxed less heavily than persons performing only one activity in-state (there, use; here, transfer). There, as here, the principle to be applied is the "strict rule of equality": equal treatment of similarly situated taxpayers without regard for whether certain of their activities occur in-state or out-of-state. 373 U.S. at 70. Judged in accordance with this principle, section 270-a of the New York transfer tax is unconstitutional.

[1] Jurisdictional Statement, p. 14, n. 13. Because plaintiffs have never questioned New York State's authority to impose a non-discriminatory tax on the in-state transfer and delivery of securities, plaintiffs' explicit recognition of that authority in this appeal cannot be a "concession" as defendants assert. (Motion to Dismiss, p. 17.) Defendants also assert that plaintiffs' argument that the New York tax discriminates against their "business" is a "new point not raised below." (Motion to Dismiss, p. 17) This is also incorrect. Paragraph 13 of plaintiffs' complaint, printed as an Appendix to this brief, makes clear that from the outset the commerce clause issue in this case has focused on the discriminatory impact of the transfer tax on plaintiffs in their competition with the New York exchanges.



Defendants' citation of *Seagram and Son* v. *Hostetter,* 384 U.S. 35 (1965), also reflects their misunderstanding of the question presented by this case. Plaintiffs agree with the principle announced in *Seagram* that "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." 384 U.S. at 43. But that statement poses rather than answers the question presented here, *i.e.,* whether the discriminatory impact of New York's transfer tax places that tax within or without the domain forbidden by the commerce clause.[2]

## II. DEFENDANTS INCORRECTLY CHARACTERIZE THE TRANSFER TAX AS "IN FAVOR OF COMMERCE" WHEN IN FACT ITS CONSEQUENCES RUN PRECISELY COUNTER TO THE OBJECTIVES OF THE COMMERCE CLAUSE.

Defendants assert that the New York transfer tax is not a barrier to interstate commerce because it is "intended and designed in *favor* of such commerce by encouraging the

[2] Appellees' use of *Seagram* is particularly inappropriate here because that case involved a state's authority with respect to the regulation of liquor. It is well-settled that state action founded in the states' power under the twenty-first amendment need not conform to the same commerce clause strictures required of ordinary state taxing and regulatory enactments. As this Court stated in *Seagram,* 384 U.S. at 42:

> A state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants. . . .

occurrence of stock transactions involving non-residents in the State of New York" (Motion to Dismiss, p. 14). This totally disregards the consequences of the transfer tax for New York residents who, as even the Court of Appeals recognized, are required to pay higher rates if they sell out-of-state, *i.e.,* utilize interstate commerce, than if they sell on in-state stock exchanges. Further, defendants' argument flies in the face of the *Halliburton* decision which held unconstitutional a discriminatory tax scheme precisely because it created an economic inducement for non-residents to manufacture goods in Louisiana when they intended to use those goods in the state. As this Court stated in *Halliburton,* 373 U.S. at 73:

> . . . Clearly, approval of the Louisiana use tax in this case would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."

## III. THE MOTION TO DISMISS FAILS TO SHOW THERE IS NOT ADEQUATE JURISDICTIONAL BASIS FOR THIS APPEAL.

The Court of Appeals' treatment of plaintiffs' commerce clause argument is not made stronger by being quoted in full. (Motion to Dismiss, pp. 15-17) The inadequacies of the Court of Appeals' arguments were demonstrated in plaintiffs' Jurisdictional Statement, pp. 14-21, and the mere assertion that the opinion "correctly disposed" of plaintiffs' arguments cannot overcome these infirmities.[3]

The case law cited in the Jurisdictional Statement in support of the proposition that the commerce clause forbids discrimination against out-of-state businesses to protect in-state businesses is virtually unchallenged by the Motion to Dismiss. Defendants attempt to avoid the implications of *Welton* v. *Missouri,* 91 U.S. 275 (1875), *Nippert* v. *Richmond,* 327 U.S. 416 (1945), and other cases, not by showing their holdings to be inapposite but merely by asserting that they are irrelevant. Further, defendants are incorrect in stating that plaintiffs improperly rely on cases involving states' regulatory instead of taxing powers. Precisely the same constitutional principles protect interstate commerce from discriminatory burdens which are imposed by the states' regulatory power as those which are imposed by the states' taxing power. Indeed, this Court's opinions frequently cross-cite opinions in regulatory and tax cases.[4]

The Jurisdictional Statement establishes the substantial impact of New York State's discriminatory tax scheme on interstate competition between out-of-state exchanges and New York exchanges. The Motion to Dismiss offers no arguments to the contrary.[5] The assurance of free flowing competition among businesses of all states is the essence of the commerce clause. New York's enforcement of a tax scheme that suppresses competition from outside the state is opposed to a long and well established line of cases decided by this Court. It should not be permitted to continue.

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[3] Moreover, defendants now concede that *Miller Bros.* v. *Maryland,* 347 U.S. 340 (1950), is irrelevant to the issue presented by this case. (Motion to Dismiss, p. 20) This is one of only two authorities relied upon by the Court of Appeals for its argument that the transfer tax scheme was justifiable as "compensatory legislation". Plaintiffs' distinction of the other authority, *Alaska* v. *Artic Maid,* 366 U.S. 199 (1961), is in no way challenged by defendants' motion.

[4] *See,* for example, the quotation from Justice Cardozo's opinion in *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 527 (1935), reprinted at p. 18 of plaintiffs' Jurisdictional Statement and the quotation from *Halliburton,* a tax case, citing regulatory cases, which is reprinted on p. 13 of the Statement.

[5] The Motion to Dismiss asserts that "the volume of trading on appellants' exchanges were (sic) hardly affected by ch. 827" (p. 17, note). This assertion raises factual issues that, of course, should not be introduced on appeal. But more importantly, it misses the point of plaintiffs' complaint against the discriminatory transfer tax scheme: If New York may enforce a tax scheme that suppresses competition from outside that state, the guiding principle of commerce clause cases decided by this Court to date is violated. Furthermore, as long as the discriminatory scheme exists, inhibiting natural competitive advantages that plaintiffs' exchanges have over New York exchanges, the potential volume of plaintiffs' business must be assumed to be greater than the volume existing under the discriminatory tax scheme.

## CONCLUSION

The Jurisdictional Statement filed by the plaintiffs demonstrates that a substantial federal question is presented on appeal. The Motion to Dismiss filed by defendants fails to show that consideration of this case by this Court is unwarranted. Therefore, probable jurisdiction should be noted.

Respectfully submitted,
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## Appendix

### Complaint

. . . .

13. Clause 3 of Section 8 of Article 1 of the Constitution of the United States (the "Commerce Clause") vests in the Congress of the United States the exclusive power to regulate commerce among the several states. The sale of Taxed Securities made outside New York State or made by or through the facilities of any plaintiff herein is "commerce among the several states" within the meaning of the Commerce Clause. The Commerce Clause prohibits State legislation which interferes with interstate commerce by placing an undue burden upon or discriminating against interstate commerce. The 1969 Amendments are unconstitutional in that they violate the Commerce Clause because:

(a) they unduly burden interstate commerce by imposing a higher rate of tax when sales by nonresidents of Taxed Securities are made outside the State of New York than when such sales are made within the State of New York;

(b) they discriminate against plaintiff Exchanges, their members and the customers of such members by increasing the cost of selling Taxed Securities in, or using the facilities of, interstate commerce outside the State of New York;

(c) they protect citizens and businesses within the State of New York from competition in interstate commerce through the imposition of higher rates of tax on transfers when sales of Taxed Securities are made outside the State of New York than when such sales are made within the State of New York;

(d) they create a tax rate differential which bears no relationship to the taxpayers' activities or enjoy-

**ment of opportunities and protections within the State and which, in fact, discriminatorily, arbitrarily, and unreasonably imposes a lesser tax on transactions which involve greater activity within the State of New York; and**

**(e) they utilize the state taxing power to regulate commerce between the states by seeking to adjust competitive advantages between local stock exchanges and others in the New York securities industry on the one hand, and their counterparts outside of New York on the other. . .**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-1019**

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*Defendants-Appellees*

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ON APPEAL FROM THE STATE OF NEW YORK
COURT OF APPEALS

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## BRIEF FOR THE APPELLANTS

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## CITATIONS

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ON APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

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## BRIEF FOR THE APPELLANTS

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## OPINIONS BELOW

The opinion of the State of New York Court of Appeals is reported at 37 N.Y.2d 535, 337 N.E.2d 758, 375 N.Y.S.2d 308 (1975) and reprinted at page 31 of the Appendix. The opinion of the Appellate Division of the Supreme Court of New York, First Department is reported at 45 App.

Div.2d 356, 357 N.Y.S.2d 116 (1974) and appears as Appendix B to the Jurisdictional Statement. The memorandum decision of the Supreme Court, New York County, Special Term, is unreported, but appears as Appendix E to the Jurisdictional Statement.

## JURISDICTION

The judgment of the State of New York Court of Appeals was entered on October 21, 1975. The Notice of Appeal was filed on December 9, 1975. Probable jurisdiction was noted on March 22, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2).

## QUESTION PRESENTED

Does a state tax on securities transactions involving a sale, agreement to sell, transfer of record ownership, or delivery within the state violate the commerce clause of the United States Constitution, art. 1, § 8, cl. 3, when its avowed legislative purpose and actual effect are to place out-of-state stock exchanges at a competitive disadvantage in relation to in-state stock exchanges by subjecting transactions involving out-of-state sales to heavier taxation than identical transactions involving in-state sales?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, art. 1, § 8, cl. 3 provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The challenged statutory provision, New York Tax Law, § 270-a (McKinney Supp.) (hereinafter referred to as "section 270-a"), and the relevant provisions adding this



section to the New York Tax Law are set forth in the Appendix at pp. 14-21.

## STATEMENT OF THE CASE

Plaintiffs-Appellants (hereinafter referred to as "plaintiffs") are six stock exchanges located outside the State of New York. Defendants-Appellees (hereinafter referred to as "defendants") are the New York State Tax Commission and its members. At issue in this case is the constitutionality of a 1968 amendment to the New York Tax Law which is now section 270-a.

Since 1905, New York State has imposed a tax (hereinafter referred to as the "transfer tax") on every securities transaction which involves a sale or agreement to sell or delivery or transfer of equity securities occurring in New York State.[1] (Hereinafter such transactions are referred to as "taxable transactions".) New York's constitutional authority to impose a transfer tax was upheld by this Court in 1907, *Hatch v. Reardon*, 204 U.S. 152 (1907), and has never been challenged by plaintiffs in this law suit.

Prior to July 1, 1969, the effective date of section 270-a, the rate of tax under the transfer tax was based solely on the price of the securities sold, transferred or delivered. Accordingly, the amount of tax due on a particular taxable transaction varied with the price and number of shares involved but was not affected by which or how many of the elements of the transaction occurred within the state. Section 270-a changed the transfer tax by establishing sub-

[1] "The fact that two or more of the taxable events . . . occur within the State of New York with respect to a single transaction does not mean that more than one tax is imposed; only one tax is payable with respect to any one transaction." Rules and Regulations under the New York Tax Law, Title 20, § 440.1; 2CCH *State Tax Rep., N.Y.* ¶ 57-102(c) (1973).

stantially lower tax rates for taxable transactions involving in-state sales than for taxable transactions involving out-of-state sales of identical shares in the same amount and with the same selling price. Thus, a person transferring or delivering securities in New York pursuant to an out-of-state sale now pays a higher tax in many circumstances than one transferring or delivering the same securities pursuant to an in-state sale.[2]

Plaintiffs' operate stock exchanges outside the State of New York for the purchase and sale of securities. Many transfers of record ownership and deliveries of securities following sales on these exchanges take place within the State of New York. (App. 23.) A large portion of the securities which may be purchased and sold on plaintiffs' exchanges also may be purchased and sold on stock exchanges located within the State of New York. (App. 23-24.) By imposing a greater tax on taxable transactions involving sales on plaintiffs' exchanges than on the same transactions when they involve sales on New York exchanges, section 270-a places plaintiffs' exchanges at a disadvantage in competition with stock exchanges located in New York State.

Plaintiffs brought this suit in the Supreme Court, New York County, Special Term in 1972.[3] The complaint sought

[2] A federal statute has recently become effective which limits the application of New York's transfer tax in certain situations but which does not affect either the constitutional issue raised in this case or this Court's jurisdiction. Securities Exchange Act of 1934, § 28(d), 15 U.S.C. § 78bb(d). *See* Appendix G to the Jurisdictional Statement.

Effective July 8, 1975, New York State imposed a 25% tax surcharge on all taxes computed under the transfer tax. While this surcharge increases the absolute dollar value of the discrimination in each transaction, it does not affect the basic constitutional issue in this case. New York Tax Law, § 270-d (McKinney Supp.).

[3] No federal court had jurisdiction to grant the relief requested. 28 U.S.C. § 1341.



declaratory and injunctive relief, alleging that section 270-a violates the commerce clause of the United States Constitution, section 8 of article 1.[4] Defendants motion to dismiss was denied.

Defendants appealed and the Appellate Division of the Supreme Court reversed. The Appellate Division held that plaintiffs had standing to challenge section 270-a but that the statute did not violate the United States Constitution. Pursuant to the order of the Appellate Division, the trial court entered judgment dismissing the complaint.

Plaintiffs appealed to the State of New York Court of Appeals which affirmed dismissal of the complaint, holding that section 270-a was not unconstitutional.[5]

## ARGUMENT

### I. Section 270-a Of The New York Tax Law Discriminates Against Interstate Commerce In Violation Of The Commerce Clause Of The United States Constitution.

#### A. The Purpose And Effect Of Section 270-a Are To Make It Economically Disadvantageous For Sellers Of Securities To Effect Certain Types Of Transactions On Out-Of-State Exchanges Rather Than On In-State Exchanges.

The Legislative Findings in relation to section 270-a, New York Laws of 1968, ch. 827 § 1, read, in part:

[4] Plaintiffs also alleged violations of the privileges and immunities clause, art. 4, § 2, cl.1, and the equal protection clause of the fourteenth amendment. (Complaint, App. 2-11.) On appeal to this Court, plaintiffs rely solely on the commerce clause to establish the unconstitutionality of section 270-a.

[5] The trial court and the Appellate Division held that plaintiffs have standing to bring this suit. This Court's decisions make the correctness of those holdings clear. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The Court of Appeals did not question plaintiffs' standing nor did defendants in their Motion to Dismiss this appeal. Accordingly, the issue of standing is not addressed in this brief.

"The legislature hereby finds that: . . . In order to encourage the effecting by non-residents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by non-residents of the state of New York and a maximum tax for certain large block sales are desirable." (App. 14.)

The Governor's Memorandum on Approval of chapter 827 elaborates somewhat further on the purpose and intended effect of section 270-a:

"Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry, to one of national and international scope. *While the bulk of stock transfer still funnels through New York,* only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State where more than 90 percent of trading is in securities listed on the New York Stock Exchange. *The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.*

"The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and *will provide long-term relief from some of the competitive pressures from outside the State.*" (App. 23-24.) (Emphasis added.)

The avowed purpose of section 270-a is, therefore, to divert transactions away from the plaintiffs' exchanges and



to the stock exchanges located within New York State. As the Appellate Division stated:

"[I]ndeed a purpose of the 1969 amendment [section 270-a] was to discourage diversi[illegible] of stock transactions from New York exchanges and to encourage transactions of securities in New York." 45 App.Div.2d 365, 367, 357 N.Y.S. 2d 116, 118-119.

The discrimination against out-of-state exchanges announced as the purpose of section 270-a is accomplished in the statute by granting two categories of tax advantages to taxable transactions if, and only if, they involve in-state sales as opposed to out-of-state sales. The first of these is a ceiling or "maximum tax" of $350 in the case of taxable transactions involving sales made within New York State but not in the case of taxable transactions involving out-of-state sales. The second category of tax advantages is a 50% discount in the amount of tax due on taxable transactions of non-residents if they sell in New York State rather than outside of it (the "non-resident discount").[6]

The following examples illustrate the operation of the two discriminatory aspects of section 270-a:

**Operation of "Maximum Tax"**

X, a large investor, *e.g.,* a pension fund, wishes to sell 100,000 shares of ABC Company common stock.[7] (The residence of the investor is irrelevant.) If X sells

[6] "In each of these instances [*i.e.,* the "maximum tax" and the "non-resident discount"], the basic requirement is that the sale of the stocks must be made in the State of New York." Opinion of Best, Counsel to the New York State Department of Taxation and Finance, Sept. 1, 1970. (Reprinted as Appendix B to defendants' Motion to Dismiss this appeal.)

[7] For purposes of these examples and the subsequent graphs, it is assumed that the stock of ABC Company sells for more than $20 per share. Stock selling for less than $20 per share is subject to a lower rate of tax, but the discriminatory treatment of out-of-state sales illustrated by the two examples is not affected by the lower basic rate. In addition, no provision is made in the examples or the graphs for the 25% "tax surcharge" which became effective July 8, 1975. *See* note 2 *supra.*

on the New York Stock Exchange and transfers record ownership or effects delivery in New York, it pays only the "maximum" tax provided by Section 270-a, *i.e.*, $350. If, instead, it sells on one of the plaintiffs' exchanges and transfers record ownership or effects delivery in New York, it must pay the "regular" rate of $.05 per share without any "maximum", or a total of $5,000.

### Operation of "Non-Resident Discount"

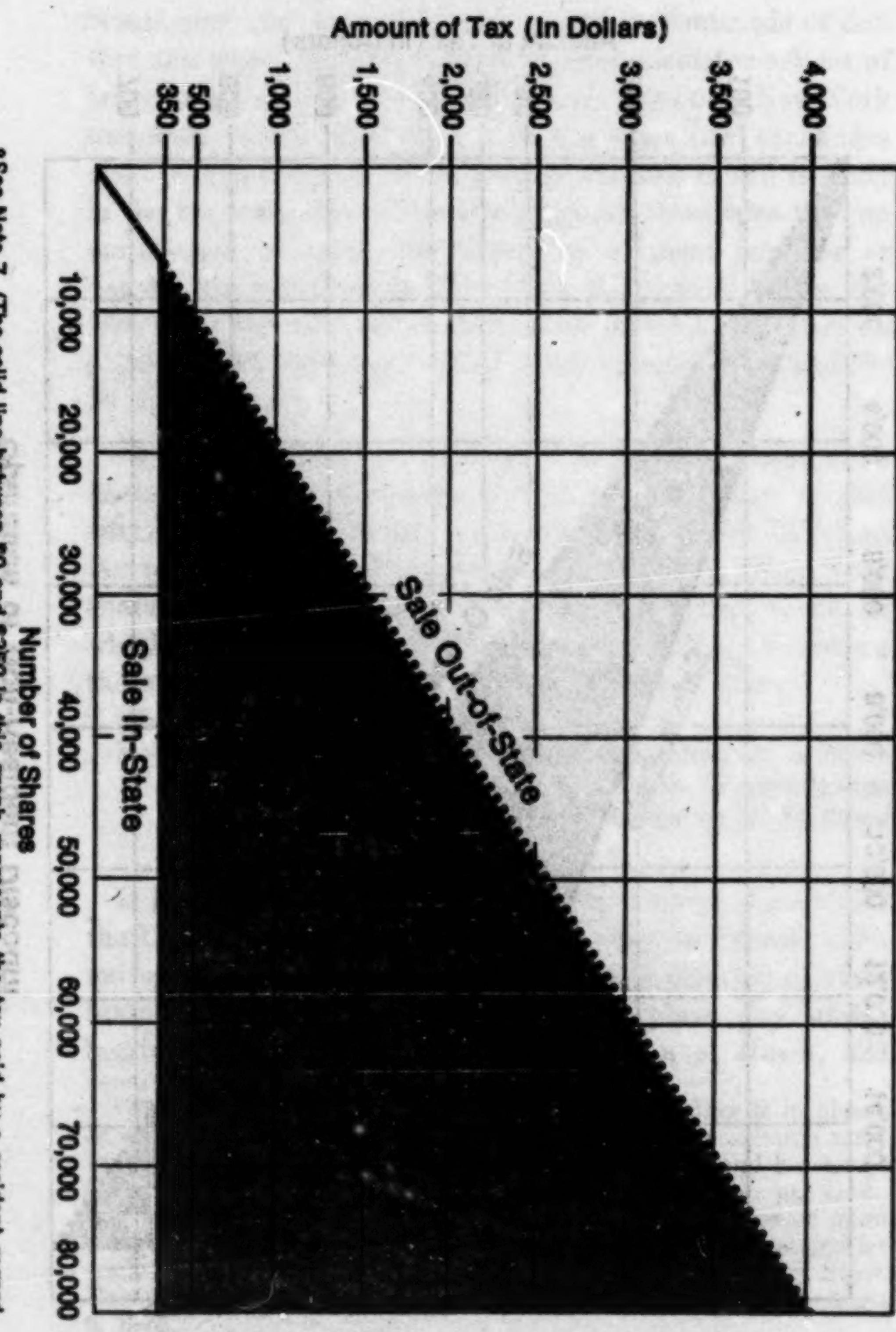
Y, a non-New York resident, wishes to sell 100 shares of ABC Company common stock.[8] If Y sells on one of the plaintiffs' exchanges and transfers record ownership or effects delivery in New York, he pays the "regular" rate of $.05 per share for a total tax of $5.00. If, on the other hand, Y sells on the New York Stock Exchange and transfers record ownership or effects delivery in New York, he pays a tax calculated at a rate of exactly half as much, *i.e.*, $.025 per share, for a total tax of $2.50. In the latter case, Y pays half as much tax not because he is a non-resident, but because he is a non-resident who sold within New York State rather than outside it.

The graphs on the next pages illustrate both the absolute impact of the unequal treatment created by the "maximum tax" and the relative significance of the discrimination inherent in the "non-resident discount". In the graphs (which are on different scales reflecting the different ranges of impact of the two separate discriminatory provisions), taxable transactions involving in-state sales are represented by the solid lines; taxable transactions involving out-of-state sales are represented by the broken lines. The shaded areas represent the difference in the amount of tax that must be paid on the same taxable transaction depending upon whether the sale is accomplished in New York or outside of New York.

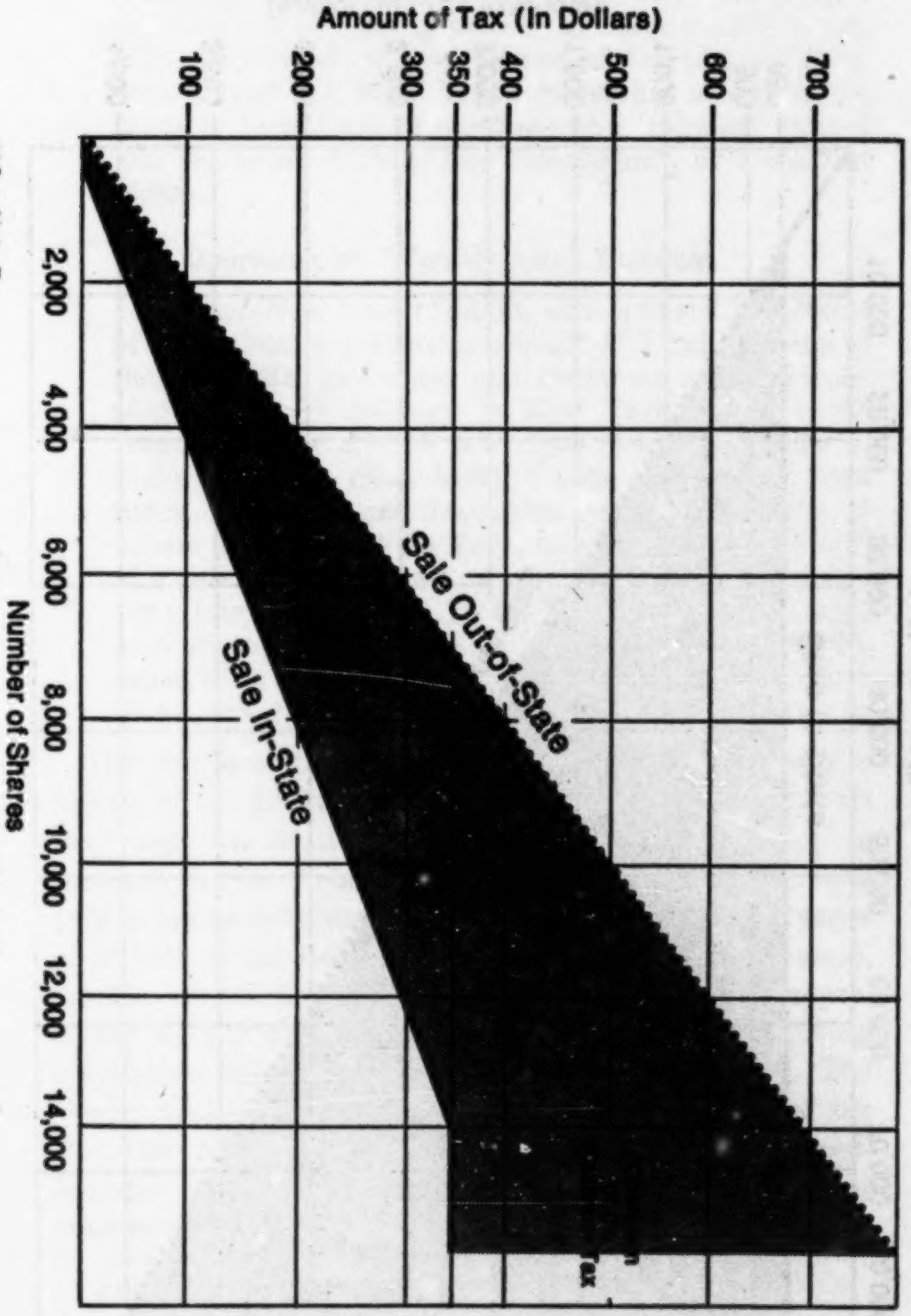
[8] *See* note 7 *supra*.



**Operation of Maximum Tax***




*See Note 7. (The solid line between $0 and $350 in this graph represents the tax paid by a resident regardless of where he sells or by a non-resident selling outside New York. The tax paid by a non-resident selling in New York would be exactly 50% of the amount here illustrated. The "maximum tax" in that circumstance would not serve as a ceiling until more than 14,000 shares were involved as shown in the next graph.)




Operation of Non-Resident Discount[10]

[10] See Note 7.



The first graph demonstrates that the benefit of the "maximum tax" provision is measured in thousands of dollars and thus offers a substantial inducement for sellers of large blocks of securities to effect their sales on a New York exchange rather than on one of the plaintiffs' exchanges even though the price at which they are able to sell is equal in the two locations.[11] The second graph illustrates that an out-of-state resident who wishes to or must transfer or deliver his securities in New York State may reduce the New York transfer tax by 50% if he sells his securities on a New York exchange rather than on one of plaintiffs' exchanges.

Clearly, section 270-a is designed to divert business away from plaintiffs' exchanges to their competitors located within New York State by imposing materially different tax rates on persons engaged in one activity in New York State, *i.e.,* transferring or delivering securities, based on whether they have engaged in another activity, *i.e.,* selling those securities, within or outside New York State.

**B. The Commerce Clause Forbids Imposition Of A State Tax, Such As Section 270-a, Which Discriminates Against Out-Of-State Businesses In Favor Of In-State Businesses.**

It has long been established that the commerce clause of the United States Constitution is not only an express delegation of power to Congress but also a prohibition of state taxing or regulatory enactments that place any undue burden on interstate commerce. *Freeman v. Hewit,* 329

[11] An increasing percentage of all securities trading is in blocks of securities large enough to take advantage of the "maximum tax". Institutional Investor Study Report of the Securities and Exchange Commission, H.R. Doc. No. 92-64, 92d Cong., 1st Sess., pt. 4, ch. XI (1971). Sales of securities in blocks of 10,000 shares or more comprised approximately 17% of the trading volume in securities traded on the New York Stock Exchange in 1975. New York Stock Exchange Research Department Newsletter, "Large Blocks", April 6, 1976.

U.S. 249, 252 (1946). In *Guy v. Baltimore,* 100 U.S. 434 (1880), Mr. Justice Harlan reviewed the relevant decisions of this Court to that date and stated the basic constitutional principle on which plaintiffs rely in this case:

> "[I]t must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.
>
> "If this were not so it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired." 100 U.S. at 439.

The discriminatory operation of section 270-a is in the classic mold of state taxing schemes designed to protect parochial state economic interests against out-of-state competition. This Court has consistently held that such statutes violate the commerce clause. *See, e.g., Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963); *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389 (1952); *Nippert v. Richmond,* 327 U.S. 416 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940); *Robbins v. Taxing District,* 120 U.S. 489 (1887); *Guy v. Baltimore,* 100 U.S. 434 (1880); *Welton v. Missouri,* 91 U.S. 275 (1876). *Cf. Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951); *H. P. Hood & Sons v. DuMond,* 336 U.S. 525 (1949); *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); *Johnson v. Haydel,* 278 U.S. 16



(1928). *See also Robert Emmet & Son Oil & Supply Co. v. Sullivan,* 158 Conn. 234, 259 A.2d 636 (1969).

This case is unique among cases arising under the commerce clause in that both the New York legislature and the Governor have baldly asserted that the purpose of the challenged statute is to discriminate against out-of-state businesses, *i.e.,* the plaintiffs' exchanges, in favor of in-state businesses, *i.e.,* the New York exchanges. (*See* p. 6 *supra.*) In their Motion to Dismiss this appeal, defendants admit this deliberate discrimination against out-of-state competitors of New York businesses. They then proceed to argue that the discrimination does not violate the commerce clause because it is "intended and designed in *favor* of [interstate] commerce by encouraging the occurrence of stock transactions involving non-residents in the State of New York." (Defendant's Motion to Dismiss, p. 14.) But defendants' argument turns the commerce clause on its head. For, as the cases cited herein make clear, one of the principal dangers the commerce clause was designed to guard against is an attempt by a state to use its taxing power to make it more expensive for customers to patronize out-of-state businesses than in-state businesses.

In *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963), this Court considered the constitutionality of a tax scheme strikingly similar to section 270-a. The issue before the Court in *Halliburton* was whether a Louisiana sales and use tax scheme violated the commerce clause by imposing a greater tax burden on persons using equipment in Louisiana that they had manufactured outside of Louisiana than on persons using equipment in Louisiana that they had manufactured in Louisiana. As in the present case, the challenged statute imposed different tax burdens on one type of activity (there, use; here, transfer or delivery) depending on whether or not another, related type of

activity had been done in-state (there, manufacture; here, sale). The Court held the Louisiana tax to be unconstitutional and in doing so articulated the basic rationale for prohibiting discriminatory taxation of the sort established by section 270-a:

> "If Louisiana were the only state to impose an additional tax burden for such out-of-state operations, the disparate treatment would be an incentive to locate within Louisiana; it would tend 'to neutralize advantages belonging to the place of origin.' *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 527. . . . Disapproval of such a result is implicit in all cases dealing with tax discrimination, since a tax which is 'discriminatory in favor of the local merchant,' *Nippert v. Richmond,* 327 U.S. 416. . . . also encourages an out-of-state operator to become a resident in order to compete on equal terms. If similar unequal tax structures were adopted in other States, a not unlikely result of affirming here, the effects would be more widespread. . . . Clearly, approval of the Louisiana use tax in this case would 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.' *Dean Milk Co. v. Madison,* 340 U.S. 349, 356. . . ." 373 U.S. at 72, 73 (footnotes omitted).[12]

The parallel between this case and *Welton v. Missouri,* 91 U.S. 275 (1876), is also striking. In *Welton,* this Court held unconstitutional a Missouri statute that required peddlers who sold merchandise which *was not* "the growth, produce, or manufacture of the State" to obtain a license. 91 U.S. at 278. No license was required of peddlers who sold merchandise which *was* "the growth, produce, or manufacture of the State". 91 U.S. at 278. In the present case, the New York transfer tax imposes a higher tax burden on taxable transactions involving a sale made in another state than on those involving a sale "made within this state".[13] The words of this Court in *Welton* should control the result here:

> "[T]he commercial power [of the Federal Government over a commodity] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin." 91 U.S. at 282.

Furthermore, on the basis of the principle set forth in *Guy v. Baltimore,* 100 U.S. 434 (1880), section 270-a is unconstitutional because it imposes a "more onerous public burden" on transactions which originate on plaintiffs' out-of-state exchanges "than it imposes on like products of its own territory". 100 U.S. at 439. Taxation of this sort has been forbidden consistently by this Court because of its tendency to impair the equality of commercial privileges guaranteed to citizens of the several states by the commerce clause.[14]

**C. The "Non-Resident Discount" Feature Of Section 270-a Discriminates Against Out-Of-State Exchanges By Imposing A Higher Rate Of Tax On Non-Residents' Transactions Involving Out-Of-State Sales Than On Those Involving In-State Sales.**

In upholding section 270-a, the State of New York Court of Appeals sought to avoid the clear holdings of prior decisions of this Court by characterizing taxable transactions by non-residents involving in-state sales and out-of-state sales as both being "interstate commerce". (App. 38.) The

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[12] The Court of Appeals brushed aside the precedential impact of *Halliburton* on this case by saying that the issue of whether an in-state sale by a non-resident loses "its interstate character" was "neither argued nor decided" in *Halliburton.* (App. 39.) This issue, however, is irrelevant to this case; *see* pt. I.C *infra.*

[13] New York Tax Law § 270-a. 1 and 2.

[14] *See* cases cited pp. 12-13 *supra.*

court then proceeded to conclude that because non-resident transactions do not involve "intrastate commerce", the competitive disadvantage at which section 270-a places plaintiffs' exchanges in relation to New York exchanges is merely the result of discrimination between various types of "interstate" transactions and thus not prohibited by the commerce clause. (App. 39.)

The Court of Appeals' approach assumes that infringement of the commerce clause can occur only where there is discrimination between clearly "interstate" transactions and wholly "intrastate" ones. But this assumption is incorrect. Whatever other interstate or intrastate elements may be present, when the discriminatory result depends on the presence of an *additional* interstate element, such as an out-of-state purchase[15] or manufacture,[16] the statute violates the commerce clause. The "non-resident discount" feature of section 270-a is precisely of this type. The discrimination in tax treatment is not based on whether the seller of a security is a resident or a non-resident, but on whether a non-resident's taxable transaction involves an in-state or an out-of-state sale.[17] Tax discrimination by a state against out-of-state businesses in favor of in-state businesses is discrimination against interstate commerce.[18] For as this Court has made clear, a fundamental purpose of the commerce clause is to prevent a state from using

[15] *E.g., Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935) (acquisition of produce out-of-state regulated in a discriminatory manner when brought into the state).

[16] *E.g., Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963) (equipment manufactured out-of-state taxed more heavily when brought into the state for use than in-state manufactured equipment).

[17] The "maximum tax" feature of section 270-a does not depend at all on non-residence; *see* part I.D *infra*.

[18] *See, e.g., Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963); *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389 (1952); *Nippert v. Richmond,* 327 U.S. 416 (1946); *Guy v. Baltimore,* 100 U.S. 434 (1880).



its taxing authority to ". . . build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore,* 100 U.S. 434, 443 (1880). Yet, this is what New York State has attempted to do for its stock exchanges.

The only authority cited by the Court of Appeals for its unique approach to the discriminatory taxation in this case is *Freeman v. Hewit,* 329 U.S. 249 (1946). That case, however, dealt solely with the jurisdiction of a state to tax an "interstate sale", 329 U.S. at 259, holding that such sales could *not* be taxed. The issue in *Freeman* is not presented here, for plaintiffs have never contested New York's authority to tax a transfer, delivery or sale of securities which occurs in the state. The question presented by this case is the authority of a state to structure its taxation of an in-state event in such a way that out-of-state businesses are thereby discriminated against in their competition with in-state businesses. The Court of Appeals' "interstate" versus "intrastate" distinction has no bearing on that question.

### D. The "Maximum Tax" Feature Of Section 270-a Discriminates Against Out-Of-State Exchanges By Making It More Expensive For Residents Or Non-Residents To Sell Blocks Of Securities Out-Of-State Than In-State.

Under section 270-a if an institutional investor, whether a New York resident or a non-resident, sells a block of stock on an in-state exchange, it pays the $350 "maximum tax", but if it sells on one of plaintiffs' exchanges and transfers or delivers in New York, it must pay the unlimited percentage rate. There is not even a colorable claim that application of the "maximum tax" to securities transactions by New York residents does not discriminate against interstate commerce—the tax clearly makes it more expensive

for a resident to sell securities out-of-state than in-state. The Court of Appeals, however, chose not to discuss the constitutional merits of this provision but rather dismissed plaintiffs' challenge with the statement that a New York resident "is more than likely" to sell securities on a New York exchange and thus the "maximum tax" provision of section 270-a ". . . should have little or no 'practical' effect on such transactions." (App. 37-38.)

In so holding, the Court of Appeals was apparently relying on *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), in which this Court stated:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." 311 U.S. at 456

In *Best*, however, a North Carolina "privilege tax" imposed on out-of-state retailers but not on "their real local competitors" was held unconstitutional because it discriminated in favor of intrastate businesses. 311 U.S. at 457. In reaching this conclusion, the Court did not suggest that it was necessary or appropriate for it to conduct an empirical inquiry into how retailers actually behaved as a result of the tax or to measure the tax's precise economic impact. To the contrary, the Court determined the "practical operation" of the tax by identifying the "real local competitors" of those out-of-state retailers on whom the tax was imposed and measuring their respective tax burdens. Because the tax burden was heavier for the out-of-state than the in-state merchants, the Court concluded that the statute could ". . . operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market." 311 U.S. at 457.



Furthermore, the Court of Appeals' assumption about the practical effect of the "maximum tax" on transactions by New York residents is incorrect as a matter of fact and without support in the record. Large institutional investors doing a national and international business (those most likely to execute the large block transactions affected by the "maximum tax") are unlikely to transact their business on a local exchange merely because of geographic proximity. Their choice of a stock exchange—assuming no tax discrimination—will be based on the best available services and prices.[19]

As long as the "maximum tax" makes it more expensive for New York residents to do business out-of-state than in-state, access to alternative securities markets by those New York residents who are dissatisfied with the services and prices offered by New York exchanges will be inhibited.[20] The assurance of such access is at the heart of the commerce clause.[21] As this Court stated in *H. P. Hood & Sons v. DuMond:*

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign

[19] "It is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the practicability of brokers executing investors' orders in the best market . . . ." Securities Exchange Act of 1934, § 11A (a)(1)(c)(iv), 15 U.S.C. § 78k-1(a)(1)(C)(iv).

[20] "It is in the public interest and appropriate for the protection of investors . . . to assure . . . fair competition . . . among exchange markets . . . ." Securities Exchange Act of 1934, § 11A(a)(1)(C)(ii), 15 U.S.C. § 78k-1(a)(1)(C)(ii).

[21] *Cf. Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 73 n. 7 (1963). That the "practical effect" of the discriminatory "maximum tax" feature may be large indeed is indicated by the growing importance of institutional transactions; *see* note 11 *supra*.

state will by customs duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." 336 U.S. 525, 539 (1948) (emphasis added).

**II. Section 270-a Cannot Be Justified Under The Commerce Clause As "Compensatory Legislation" Or As Analogous To A Valid Use Tax.**

The Court of Appeals attempted to justify section 270-a on the ground that it is "compensatory legislation" designed to "neutralize" the "economic advantage" enjoyed by out-of-state exchanges because sales on those exchanges are not taxed. (App. 37.) But, as this Court has made clear, such an ". . . attempt to neutralize economic advantages belonging to the place of origin" is prohibited by the commerce clause of the Constitution. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935).

In *Baldwin*, this Court was presented with an attempt to justify another New York statute on essentially the same grounds as those used by the Court of Appeals in this case. The plaintiff in *Baldwin* purchased milk from producers in Vermont and attempted to resell it to customers in New York State. Because New York set minimum prices to be paid in-state producers, plaintiff could buy milk from Vermont producers at lower prices than his competitors could buy from New York producers. In an effort to "neutralize" this "economic advantage" of Vermont producers, 294 U.S. at 528, New York prohibited the sale of milk to customers in New York State if the milk had been purchased from out-of-state producers for less than the minimum price set by the state.



In rejecting New York's rationale for this prohibition, Justice Cardozo, for this Court, stated:

> "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. . . . The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended." 294 U.S. at 527.

As New York could not protect its farmers by "neutralizing" the advantage Vermont's farmers enjoyed by not being subject to New York's fixed minimum prices, it cannot protect its stock exchanges by "neutralizing" the advantage out-of-state exchanges enjoy by not having their sales subject to New York's tax. Without section 270-a it may be to a seller's economic advantage to sell his securities on an exchange located outside of New York State rather than on one located in the state. But the effect of the discriminatory tax is that if the seller must, or wishes to, bring those securities into New York for transfer or delivery, he not only loses the economic advantage of selling on an out-of-state exchange but also is put at an economic disadvantage in comparison to a seller of the same securities on an in-state exchange. Thus under section 270-a a seller of securities on one of plaintiffs' exchanges is in effect subjected to an "impost" or "customs duty" which New York has ". . . framed for the very purpose of suppressing competition from without [the state]." 294 U.S. at 527. Therefore, rather than providing a justification for sec-

tion 270-a, the fact that the statute represents an effort to "neutralize" the economic advantages enjoyed by out-of-state exchanges renders it invalid under the commerce clause.

The only support offered by the New York Court of Appeals for its characterization of section 270-a as "compensatory legislation" is an analogy to sales-use tax schemes. (App. 37.) But such schemes are valid only insofar as they tax an in-state event, *i.e.*, the use of goods, in order to "compensate" for the absence of a tax on a related out-of-state event, *i.e.*, the purchase of the same goods, which would have been taxed if it had occurred in-state.[22] The objective—and basis for the constitutional validity—of a sales-use tax scheme is the equal taxation of identical transactions irrespective of which of their elements, *i.e.*, purchase or use or both, occurs in-state. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Section 270-a does not result in equal tax burdens for similarly situated taxpayers, which is the "strict rule" applied by this Court to determine the validity of compensatory use taxes. *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Therefore, the court's attempt to analogize section 270-a to sales-use tax schemes fails.

*Halliburton* is directly on point with respect to the validity of section 270-a as a compensating tax. In *Halliburton* a greater tax was imposed on persons using equipment in Louisiana that they had manufactured out-of-state than on persons using equipment in Louisiana that they had manufactured in-state. Section 270-a imposes a greater tax

[22] Freedom from taxes where no element of the transaction occurs in the state, of course, is guaranteed by the due process clause of the fourteenth amendment. *Nippert v. Richmond*, 327 U.S. 416, 423 (1946).



on persons transferring or delivering securities in New York that they have sold out-of-state than on persons transferring or delivering securities in New York that they have sold in-state. In evaluating the tax in *Halliburton*, this Court stated:

> "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." 373 U.S. at 70.

The tax in *Halliburton* was struck down for violating this "strict rule of equality." 373 U.S. at 73. Section 270-a is invalid for the same reason.

The only relevant authority cited by the Court of Appeals in support of its view is *Alaska v. Arctic Maid*, 366 U.S. 199 (1961).[23] In that case, Alaska imposed an "occupation" tax on freezer ships obtaining fish in Alaska's territorial waters and transporting them to out-of-state canneries. Alaska canners were the competitors of these freezer ships. This Court held the tax valid because it did not involve any ". . . discrimination in favor of the former against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the . . . tax on the local canners." 366 U.S. at 204. In the instant case, however, the New York tax on transactions involving out-of-state sales *does exceed* the tax imposed on comparable transactions involving in-state sales. Thus rather than supporting section 270-a, *Arctic Maid* highlights its infirmities under the commerce clause.

[23] The Court of Appeals also cited *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954). The issue in that case, however, was not the validity of a compensating use tax, but rather the right of a state imposing a use tax to force an out-of-state merchant to collect the tax from a vendee who was a resident of the taxing state. Defendants concede that *Miller Brothers* is irrelevant to the issue presented by this case. (Motion to Dismiss this appeal at 20.)

## CONCLUSION

**For the reasons stated, it is respectfully urged that the decision of the State of New York Court of Appeals be reversed and that section 270-a of the New York Tax Law be declared invalid under the commerce clause of the United States Constitution.**

**Respectfully submitted,**

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(G-68)

IN THE

# Supreme Court of the United States

October Term, 1975
No. 75-1019

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Appellants,*

*v.*

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Appellees.*

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS.

## BRIEF FOR APPELLEES

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## INDEX.

## CITATIONS.

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## BRIEF FOR APPELLEES

This Court noted probable jurisdiction on March 22, 1976, .... U.S. ...., 47 L.Ed.2d 730, on an appeal by appellants of a decision by the Court of Appeals of the State of New York. The unanimous decision and opinion appear in the Jurisdictional Statement, at pp. 31 *et seq.*

Reported at 37 N Y 2d 535 (1975).

### Question Presented

Whether plaintiffs' out-of-state stock exchanges, not subject to the New York Stock Transfer Tax, are remotely and unconstitutionally discriminated against under the Commerce Clause of the Constitution of the United States (Art. 1, § 8, cl. 3), when such transfer tax, classified for such purpose, has no extra-territorial tax application and (a) is imposed only upon certain stock sales made within the State by non-residents at tax rates lower than those imposed upon like sales made by residents (New York Tax Law, § 270-a(1)), and (b) a reduced but maximum tax is imposed upon statutorily defined large block sales of stock made within the State, whether made by residents or non-residents (*ibid.*, § 270-a(2)), when such tax statute was enacted to protect and preserve the State's securities industry, the State's economy, and the public revenue.

The precise question presented, therefore, is certainly not, as incorrectly posed by appellants, whether the statute subjects "transactions involving out-of-state sales to heavier taxation than identical transactions involving in-state sales?" (Brief, p. 2), in fact, no transfer tax whatever is imposed on out-of-state sales but is imposed only *if* stock is later transferred *within* the State by the local transfer agent or by the corporation whose stock is to be transferred, a purely local incident at the end of the stream of commerce having a sufficient local nexus to justify the transfer tax.[1]

[1] Appellants have abandoned all other constitutional objections to § 270-a raised in their complaint (Jurisdictional Appendix, pp. 7-9), at various stages of this action, *viz.:* the Privileges and Immunities Clause of Article 4, § 2 (upon appeal the Court of Appeals, 37 N Y 2d 535, 538; Jurisdictional Statement, p. 9), and the Equal Protection Clause of the Fourteenth Amendment in this Court (Jurisdictional Statement, p. 3; Brief, p. 5).



Of course, if appellants prevail, then the taxable status quo is restored to where it was before the enactment of Tax Law, § 270-a, *supra*, by virtue of the New York Laws of 1968, ch. 827. Section 11 thereof requires the reimposition of the higher rates of taxation imposed by Tax Law, § 270, without distinction between the sales by non-residents or large block sales or transfers within the State. Ch. 827, *supra*, § 10 also provides for the separability of § 270-a in the event of the unconstitutionality of any of its subdivisions so that the others remain viable as enacted.

Sections 10 and 11 of ch. 827 are reproduced as Appendix A hereto.

### Statute Involved and Administrative Implementation

#### 1. The Statute

The New York Transfer Tax (Tax Law, § 270-a) under attack was enacted by the Laws of 1968, ch. 827 and is reproduced in part in the Jurisdictional Statement of the Appellants, pp. 14-21 with its legislative history appearing at pp. 22-30.

Section 4 of ch. 827 enacted § 270-a, and subdivision 1 thereof provides for reduced stock transfer taxes to non-residents for sales made in New York State whereas subdivision 2 provides for a reduced but maximum tax imposed upon certain so-called large block sales of stock made in New York State, whether made by residents or non-residents. Both subdivisions were sustained by the New York Court of Appeals as constitutional.

The reason for the enactment of § 270-a is expressed in the legislative findings reflecting the public policy of the State, as follows:

"Section 1. Legislative findings. The legislature hereby finds that: The securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable."

**2. Legislative History:**

Chapter 827, *supra,* including its legislative findings, was the result of two years of negotiation between the New York Stock Exchange, the City of New York, legislative leaders and the State administration (25-26)[2] to induce this Exchange to remain in the City of New York, "and to making New York the financial center of the world", to bolster the securities industry, to preserve and protect the economy, and the public revenue, and to meet the competition from out-of-state exchanges (23-30). The statement of the New York Stock Exchange with respect to the

[2] Page references are to the Jurisdictional Statement.



necessity for the enactment of chapter 827 and the financial contribution by the securities industry to the economy of the City and State of New York appears at pages 25-30.

As to the need for the reduced tax imposed by section 270-a(1), *supra,* on sales made by non-residents the Exchange reported (51):

"Non-Resident Individuals

"Customers of the New York securities markets who live and work outside the State pay some 80% of the transfer tax. Some non-residents can and do avoid paying the tax by transacting their securities business outside New York on the regional stock exchanges. The brokerage commission charged by these exchanges is the same as in New York. However, none of the cities or states where the regional exchanges are located imposes a stock transfer tax."

As to the need for special provisions pertaining to the sales of large blocks of stock (§ 270-a(2), *supra*), the Exchange also reported (27-28):

"Large Transactions

"There is also an incentive to avoid the stock transfer tax on large orders. Transactions of 10,000 or more shares on the regional exchanges have increased by 202% in 1965-67.

"Proposal for Tax Reform

"As a result of these studies, the proposal for tax reform has two basic objectives:

"1) Retain the revenue from the tax.

"2) Minimize the competitive problems for New York securities markets created by the existing law and provide a sound base for future increased tax revenues.

"Over a five-year period, the proposed tax reform would:

"1) Provide for a 50% reduction from the existing tax rates for non-resident individuals.

"2) Set a tax ceiling of $350 per transaction. On a stock selling for $20 or more the maximum shares taxed would be 7000.

"No special tax relief is provided for Exchange members or securities broker-dealers.

"In essence, the purpose of the bill is to reduce the incentives to avoid the tax by doing business outside the New York markets.

* * *"

Executive approval of chapter 827 was accompanied by the Governor's memorandum of approval which expresses the legislative findings, intent and purpose of the enactment, in part as, follows (23-24):

"*On approving L.1968, c.827, which continues the present stock transfer tax rates until July 1, 1969, the Governor stated:*

*June 16, 1968*

"* * *

"Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry to one of national and international scope. While the bulk of stock transfers still funnels through New York, only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State where more than 90 percent of trading is in securities listed on the New York



Stock Exchange. The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.

"The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and will provide long-term relief from some of the competitive pressures from outside the State.

"As a result of adoption of the revisions of the stock transfer tax contained in this bill, the New York Stock Exchange has announced that it intends to remain and expand in New York and is not studying sites for a new exchange building in downtown Manhattan. The Exchange's action augurs well for the future growth of New York as the Nation's financial center and acknowledges the confidence of the industry in the ability of city government and the legislature to recognize the industry's problems and to commit themselves to a long-term course for the benefit of all.

"The bill is approved.

Nelson A. Rockefeller"

### 3. Administrative Implementation

Detailed administrative regulations have been promulgated with respect to the construction and application of the Stock Transfer Tax, including those under section 270-a, *supra.* They appear in *New York Codes, Rules and Regulations,* vol. 20, Taxation and Finance, §§ 440.1 *et seq.* In addition to these regulations, counsel to the Tax Department rendered an opinion, dated September 1, 1970 (see e.g. *C.C.H. New York Tax Service,* vol. 2, ¶ 57-401a), which sets forth more precise examples than do appellants (Brief, pp. 7-8) concerning the imposition of the tax upon sales by non-residents and large block sales. This opinion appears as Appendix B hereto.

In addition to this, we must point out the inaccuracy of appellants' statement in their Brief, p. 4:

"Thus a person transferring or delivering securities in New York pursuant to an out-of-state sale now pays a higher tax in many circumstances than one transferring or delivering the same securities pursuant to an in-state sale."

Since the addition of section 28(d) to the Securities Exchange Act of 1934, as amended in 1975 by P.L. 94-29 (89 Stat. 97, 161, § 28(d); 15 U.S.C. § 78bb(d), this no longer holds true. This statement is now moot and is no longer involved, on and after December 1, 1975, the effective date for the application of section 28(d), as a result of an opinion rendered by Counsel to the New York State Department of Taxation and Finance, dated December 1, 1975 (*C.C.H. New York Tax Reports, No. 525,* p. 3; *C.C.H. New York Tax Service,* vol. 2, ¶ 57-101.605). This is appended hereto as Appendix C, and states, in part:

"* * *

Section 21 of the new Federal law adds a new section 28(d) to the Securities Exchange Act of 1934. This act provides, in part, as follows:

'(d) No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision . . .'

"The Stock Transfer Tax Regulations provide that a transfer of record ownership on the books of a corporation within the State is subject to the stock transfer tax (20 NYCRR 440.2). However, in view of the Federal law, where the sole event in New York State is the delivery or transfer to or by a 'registered clearing agency' or a 'registered transfer agent', as those terms are defined under the Securities Exchange Act of 1934, there is no stock transfer tax due and owing on and after December 1, 1975. However, where a sale, agreement to sell, memorandum of sale or any other delivery or transfer takes place in New York State, the stock transfer tax due and owing thereon must be paid.

* * *"



Thus, appellants' examples of the "Operation of the 'Maximum Tax'" and "Operation of 'Non-Resident Discount'" (Brief, pp. 7-8,) must be construed in the light of this opinion.[3]

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[3] Appellants graphs illustrative of these examples are also *incorrect* (Brief, pp. 9-10) and require correction and clarification. The footnote pertaining to the graph "Operation of Maximum Tax" is incorrect. A correct footnote should read instead: "The solid line between $0 and $350 in this graph represents the tax paid by a resident and non-resident selling in New York State." The balance of the footnote through the word "circumstance" would be more appropriate instead as a footnote to the graph on p. 10 at the Brief "Operation of Non-Resident Discount" with the following changes added thereto: "The tax paid by a non-resident selling in New York would be exactly 50% of the amount shown by the dotted line. The 'maximum tax' in that circumstance would not serve as a ceiling until more than 14,000 shares were involved as shown above."

Moreover, since appellants, in passing, make only "footnote" reference to P.L. 94-29, §§ 11A(a) (1) (c) (ii) and 28(d) (Brief, pp. 4, 19), the significance of this entire legislation to the issue involved is overlooked and incomplete. This will be shown under the Argument hereafter.

## ARGUMENT

**The reduced tax rates imposed by the Stock Transfer Tax upon sales in New York are purely upon local transactions at the end of commerce which neither burden nor discriminate against interstate commerce within the meaning of the Interstate Commerce Clause.**

**A. Introduction.**

The sole question involved is whether the State of New York has the constitutional power under the Tenth Amendment and pursuant to its taxing powers to enact legislation (L. 1968, ch. 827) in order to protect its economic interests, its public revenue, a major industry, and the economic welfare of its citizens dependent thereon. This is clearly demonstrated by the legislative history of ch. 827, above discussed, and which is effectuated by providing tax inducements in lower tax rates for the sale of "large blocks" of stock and for sales by nonresidents to both when sales transactions occur within the State.[4] The legislative objectives on a domestic level are no different from those national objectives which Congress recognize with the enactment of P.L. 94-29 (89 Stat. 97; 15 U.S.C. §§ 78 *et seq.).*

[4] These benefits are no different from those afforded by Article 16, § 3 of the New York Constitution which prohibits an income tax upon income of non-residents and foreign corporations, unless carrying on a

(Footnote continued on following page)



Thus, P.L. 94 provides (89 Stat. 111, § 7):

"Sec. 11A(a) (1) The Congress finds that—

"(A) The securities markets are an important national asset which must be preserved and strengthened.

* * *"

This came after the *Senate Report* No. 94-75 stated (p. 3; *U.S. Code Congressional and Administrative News,* Vol. 1, 94th Cong. 1st Sess., 1975, pp. 181-187):

"The securities markets of the United States are indispensable to the growth and health of this country's and the world's economy. In order to raise the enormous sums of investment capital that will be needed in the years ahead and to assure that that capital is properly allocated among competing uses, these markets must continue to operate fairly and efficiently. In the Committee's view, the increasing tempo and magnitude of the changes that are occurring in our domestic and international economy make it clear that the securities markets are due to be tested as never before. Unless these markets adapt and respond to the demands placed upon them, there is a danger that America will lose ground as an inter-

(Footnote continued from preceding page)

business, if they merely kept their "money and securities" in New York. Its purpose was to attract and retain investments from such sources free from tax which had always been the State's policy since the enactment of the Personal Income Tax in 1919 (ch. 627), first by administrative construction, later by statute since 1933, and finally, by Constitutional mandate in 1938 (see, *e.g.,* 1939 *Annual Report of the State Tax Commission,* 1940 *Leg. Doc.,* No. 11, pp. 9-10, 29-30). Its purpose, as with L. 1968, ch. 827, was: "Thus enormous amounts of such intangible personalty from all over the United States will be attracted to this State, making for the conservation of the financial center of the country here." (1938 *Constitutional Journal and Documents,* No. 2, p. 3, see also, pp. 413-415, *ibid.,* and 1938 Constitution Revised Record, Vol. III, pp. 1113-1119, 2470-2472; *Matter of Goodwin v. State Tax Commission,* 286 App. Div. 694 [1955], affd. 1 N Y 2d 680, app. dsmd. 352 U.S. 805).

national financial center and that the economic, financial and commercial interests of the Nation will suffer.

The rapid attainment of a national market system as envisaged by this bill is important, therefore, not simply to provide greater investor protection and bolster sagging investor confidence but also to assure that the country maintains a strong, effective and efficient capital raising and capital allocating system in the years ahead.

The basic goals of the Exchange Act remain salutary and unchallenged: to provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities is fair and without undue preferences or advantages among investors, to ensure that securities can be purchased and sold at economically efficient transaction costs, and to provide, to the maximum degree practicable, markets that are open and orderly. S. 249 is an important step in assuring that the securities markets and the regulations of the securities industry remain strong and capable of fostering these fundamental goals under changing economic and technological conditions."

The House Conference Report No. 94-229 reported in the same vein at p. 9 of its report *(op. cite.*, p. 322).

At the same time, a statutory provision was also added to provide for greater competition within the securities industry (P.L. 94-29, §§11 A(b) and (c)(1). The reasons therefor were reported in Senate Report No. 94-75, pp. 12-14; *op. cite.*, pp. 190-193. While this recognition is true, as appellants note (Brief, p. 19), nevertheless, they fail to disclose in their long footnote to §28(d) (Brief, p. 4) the reasons why Congress also added §28(d), (P.L. 94-29, 89 Stat. 161, 15 U.S.C. §78 bb [d]). Section 28(d) provides:

"(d) No State or political subdivision thereof shall impose any tax on any change in beneficial or



record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefore or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change is[1] beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision. No State or political subdivision thereof shall impose any tax on securities which are deposited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State of political subdivision."

It is clear, however, from the Congressional reports relating to this section that Congress did not intend to divest nor deprive the States of all existing or future power to impose a stock transfer tax upon local transactions at the end of interstate commerce. This was clearly recognized by its Congressional reports on its legislative intent despite the need for competition within the securities industry. Thus, it was also noted that a *prior* subcommittee report of 1972 had recommended: "4. Legislation be enacted prohibiting the imposition of state and local taxes in such a way as to inhibit unreasonably the development of an efficient *national clearing and depository system;* * * *." (Emphasis added, *op. cite.*, p. 232), nevertheless, this phraseology must be dis-

tinguished from a localized stock transfer tax imposed following a sale of stock, as the Senate Report on P.L. 94-29, *supra,* in fact noted later. This report is quite specific in expressing Congressional intent of non-interference with existing powers in the States pertaining to local stock transfer taxation by especially noting *(Senate Report No. 94-75,* p. 60; *U.S. Code Congressional and Administrative News, supra,* Vol. 1, 94th Cong., 1st Sess., 1975, p. 238):

> D. STATE TAXES ON SECURITIES TRANSACTIONS
>
> "During its previous hearings on paperwork processing legislation, the Committee received evidence that the imposition of state transfer taxes may be impeding the development of a national system of processing securities transactions. At the time of its hearings in October of 1971, for example, it appeared that the New York Stock Transfer Tax might apply to transactions, regardless of where or between whom executed, if delivery were made by means of bookkeeping entry in New York or by the movement of securities in or out of a New York depository or clearing house. Recent amendments to the New York Stock Transfer Tax may have eliminated this particular problem, but the evidence also revealed that other state and local authorities are considering the imposition of stock transfer taxes as one means of producing badly needed revenue. The Committee expresses no opinion regarding the wisdom of such taxes provided they are not applied in such a way as to impede the development of a national system of clearing and settling securities transactions. But, prohibition of state transfer taxes which do impede such development is clearly in the public interest.
>
> Therefore, the bill prohibits the imposition of state taxes on securities or upon the transfer of securities merely because the facilities of a clearing agency are physically located in the taxing state (Section 28(a)).



> This provision is designed to facilitate the development of a national system for handling securities transactions while at the same time preserving the state taxing powers over transactions with which the taxing state has a traditional jurisdictional basis for taxation."

and again thereafter in its "section by section analysis" of the legislation (*op. cite,* p. 139, *ibid.,* p. 316):

> "Subsection (d) to Section 28 to prevent the application of State or local taxes on securities or on the transfer of securities solely because the facilities of a registered clearing agency (or nominee thereof) are physically located in the taxing jurisdiction. The section is designed to work the least possible interference with State law while at the same time facilitating the purposes of the bill. States with jurisdictional bases for taxation other than activities with respect to clearing agencies would not be affected."

**B. No Constitutional Infirmity Exists Under the Interstate Commerce Clause.**

Appellants' constitutional objections to the reduced tax rates afforded by Tax Law, § 270-a upon sales in New York to both non-residents and to the sales of large block shares of stock, whether by residents or not, are devoid of merit. As noted below (37 N Y 2d 535, 540, Jurisdictional Statement, p. 34): "If section 270-a is invalidated, the prior tax scheme would again become effective L. 1968 ch. 827, § 11) and the appellants would be restored to their position of economic superiority". However, the former tax scheme, of course, was sustained by this Court long ago against the very claim, as made here, that the stock transfer tax imposed an unconstitutional burden upon interstate commerce for transfers of stock made in New York *(Hatch* v. *Reardon,* 204 U. S. 152 [1906]; see also *O'Kane* v. *State of New York,* 283 N.Y. 439 [1940]; *cf. Freeman* v. *Hewitt,* 329 U.S. 249 [1946]).

The present tax is neither a burden upon nor a discrimination against interstate commerce within the meaning of the Commerce Clause. Quite the contrary, the reduced tax rates erect no barrier against the free flow of commerce, since they are intended and designed in *favor* of such commerce by encouraging the occurrence of stock transactions involving non-residents in the State of New York. The statute imposes no prohibition upon or restriction against the sales of stock upon any securities exchange and a seller of stock is free, at his option, to sell wherever the stock is listed. If sold outside New York, the transfer tax is imposed under Tax Law, § 270, *supra*, and at a higher rate *only* if "* * * the stock is transferred in New York by a local transfer agent or upon the corporate books", as noted below (37 N Y 2d 535, 539) (Jurisdictional Statement, p. 32). In such case, the taxable event is dependent upon the fortuitous circumstance of the location of the transfer agent or the corporate books within New York, even though no other State imposes a similar tax. If the stock is sold and transferred elsewhere, then no tax is or can be imposed by New York. Accordingly, the location of either the transfer agent or the corporate books within New York constitutes sufficient nexus to justify the local tax in return for the services, protection, and facilities afforded by the State and its subdivisions,[5] since, as noted below, "It is now well settled that

[5] After defraying administrative costs of the transfer tax, its entire revenue is payable into the special account for the Municipal Assistance Corporation for the City of New York for the repayment of the City's obligations to the Corporation and the surplus is paid into the general fund of the City of New York for the support of local government pursuant to State Finance Law, § 92-b (L. 1965, ch. 91, as amended by L. 1966, ch. 3, L. 1969, ch. 768 and L. 1975, ch. 768, § 7). This is in complete accord with the principle that "interstate commerce bear its proper share of the costs of local government in return for the benefits received." *(Mich-W... Pipeline Co.* v. *Calvert,* 374 U.S. 157, 166

(Footnote continued on following page)



the Commerce Clause does not prohibit the States from levying a tax on the transfer of property within the State *(Harvester Co.* v. *Department of Treasury,* 322 U.S. 340, 348; cf. *Freeman* v. *Hewitt,* 329 U.S. 249, 258)." (37 NY 2d 535, 539, Jurisdictional Statement, pp. 32-33). After all, the transfer tax is imposed as the result of *local* incident at the *end* of interstate commerce and is not unlike a sales tax imposed on a transfer of property at the end of such commerce (see *e.g. McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33 [1940]), or an ad valorem property tax at the end of foreign commerce (*Michelin Tire Corp.* v. *Wages, Tax Commissioner, et al.,* ...... U.S. ......, 46 L. Ed. 2d. 495, decided January 14, 1976).

Accordingly, the New York Court of Appeals correctly disposed of appellants' constitutional objections under the Commerce Clause, as follows (37 N Y 2d 535-543, Jurisdictional Statement, pp. 37-39):

> "Here, as indicated, the Legislature found that the tax as originally enacted had the reverse effect in that it conferred an economic advantage on exchanges located outside the State. The appellants do not dispute this. To neutralize this advantage, the Legislature enacted section 270-a and it seems clear that they had the power to do so. A use tax is a familiar example of this type of compensatory legislation and it is well settled that it does not offend the commerce clause (see, e.g., *Miller Bros. Co. v. Maryland,* 347 US 340, 343; cf. *Alaska v. Arctic Maid,* 366 US 199). Thus the stated legislative goal is a valid one.

(Footnote continued from preceding page)

(1954)). The added surcharge of 25%, referred to by appellants (Brief, p. 4), imposed by L. 1975 ch. 395 was merely one of a series of laws enacted for the benefit of the City of New York to meet its "severe fiscal crisis" (ch's. 394-396).

Although helpful, this is not necessarily controlling for the determinative question in each case is 'whether the statute under attack *** will in its practical operation work discrimination against interstate commerce' *(Best & Co. v. Maxwell,* 311 US 454, 456, *supra).*

The statute should have no practical effect whatsoever on sales by shareholders, both residents and non-residents, involving stocks which do not have to be transferred in New York. If they sell on a New York exchange, of course they can claim the benefit of section 270-a. But if they sell on one of the appellants' exchanges, they would pay no tax at all. Here the stock transfer law still works to the appellants' economic advantage.

The sale of New York securities poses a different problem. Then the transfer tax must be paid and the amount due depends on whether the sale is made in New York or elsewhere. In the case of New York residents it is more than likely (cf. *Nippert v. Richmond,* 327 US 416) that the sale would be made on a New York exchange in any event, so that section 270-a should have little or no 'practical' effect on such transactions.

The appellants' major argument then is that section 270-a discriminates against interstate commerce by encouraging nonresidents to sell New York securities on New York exchanges. This assumes that such sales would be intrastate so that the practical effect of the statute would be to 'discriminate against interstate commerce in favor of intrastate commerce' *(O'Kane,* 283 NY 439, 446, *supra).*

The sale of intangibles is, of course, commerce within the meaning of the commerce clause *(Freeman v. Hewit,* 329 US 249). And we can assume that sales of New York stocks by a nonresident on an out-of-State exchange would nevertheless involve interstate commerce because the securities must ultimately be trans-



ferred in New York (but see *Hatch v. Reardon,* 204 US 152, *supra).* But we cannot assume, as the appellants do, that if the non-resident chooses to make the sale in New York—in order to claim the exemption provided by the statute—the transaction would lose its interstate character.

Typical of this latter type of transaction is one in which a resident of one of the areas in which the appellants operate gives his New York broker, or a New York correspondent of a local broker, an order to sell. When, in such a case, the New York broker executes the order, the customer will normally send his stock certificate to the New York broker to fulfill his agreement to sell. Such a sale is not an intrastate transaction. On the contrary in *Freeman v. Hewit* (329 US 249, 259, *supra*) the Supreme Court considered an identical transaction and concluded 'Of course this is an interstate sale'. In other words the trouble with the appellants' argument is that a sale by a nonresident on a New York exchange—the type of transaction the law allegedly encourages—is still interstate commerce. Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co. v. Reily* (373 US 64, *supra*) compels a different result since in that case this precise point was neither argued nor decided."

**C. Inapplicability of Appellants' Citations.**

In their previous Jurisdictional Statement to this Court, appellants conceded that New York had the "authority to tax the transfer, delivery and sale of securities which occur in-state" (Statement, p. 14), and they state in their Brief from (p. 3) "New York's constitutional authority to impose a transfer tax was upheld by this Court in 1907, *Hatch* v. *Reardon,* 204 U.S. 152 (1907)". Nonetheless, for economic superiority they seek a restoration of the former but higher tax rates which would be imposed, if they prevail, upon the very same kind of in-state transactions,

since they contend their own local *business* has been adversely affected by New York's present lower tax rates, not that the commerce into and in New York at the end of interstate commerce has been burdened by New York's tax inducements.

The sole question is the constitutionality of the tax as applied in New York to transactions occurring there and nowhere else. After all, New York is not required to permanently retain its tax structure as originally enacted when, as here, such structure requires modification to meet changing economic conditions of the market place within its own constitutional sphere of authority, as the legislative history of Tax Law, § 270-a, *supra,* clearly demonstrates. As a matter of fact, the Court of Appeals rejected appellants' argument for a return to "economic superiority" under present circumstances, as noted above (35 NY 2d 535, 540) (Jurisdictional Statement, p. 37). As this Court has stated: "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." (*Seagram and Son* v. *Hostetter,* 384 U. S. 35, 43, citing cases [1965], rearg. den., *ibid.,* 967). In other words, when a State acts constitutionally within its borders for its own economic interests, "Certainly this Court will not interpose its own economic views or guesses when the State has made its choice." (*Safeway Stores* v. *Oklahoma Grocers,* 360 U. S. 334, 341 [1958]; see also *Mich.-Wis. Pipeline Co.* v. *Calvert,* 347 U. S. 157, 166 *supra*). This is precisely the situation here.

The fundamental weakness of appellants' specious contentions stems from the failure to heed the warnings of this Court pertaining to the guidelines for constitutional interpretation, by the citation of irrelevant cases, a mis-



reading thereof, and by generalized extractions therefrom wholly out of context and which upon analysis upon their facts and law have absolutely no application to the precise issue here, *viz.:*

> "We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations excluding the concrete circumstances which they profess to summarize." (*Wisconsin* v. *J. C. Penny Co.,* 311 U. S. 435, 445 [1940]).

and stated somewhat differently:

> "Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as a product of preoccupation with their special facts." (*Freeman* v. *Hewitt, supra,* 329 U. S. 249, 252 [1946], rehrg. den. 329 U.S. 832).

These guidelines have been consistently followed by this Court (see, *e.g., Michelin Tire Corp.* v. *Wages, Tax Commissioner, et al., supra,* .... U. S. ...., 46 L.Ed. 2d 495, [Jan. 1976]) and by the Court below (see, *e.g., Shapiro* v. *City of New York,* 32 N Y 2d 96, 108 [1973], app. dsm. for want of a substantial federal question, 414 U. S. 804, rehrg. den. at p. 1087), and, indeed, in this very case when the Court of Appeals concluded:

> "Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co.* v. *Reily* (373 U. S. 64, *supra*) compels a different result, since in that case this precise point was neither argued nor decided." (37 N Y 2d 535, 543, Jurisdictional Statement, p. 39).

It is for these reasons that appellants' citations are irrelevant and inapplicable here. The opinions in *Freeman* v. *Hewitt, supra,* 329 U. S. 249 (1946), clearly isolates and

disposes of, as inapplicable to the circumstances here, the earlier cases of *Welton* v. *Missouri,* 91 U. S. 275 (1875); *Guy* v. *Baltimore,* 100 U. S. 434 (1879); *Robbins* v. *Shelby Taxing District,* 120 U. S. 489 (1886); *Best & Co. v. Maxwell,* 311 U. S. 454 (1940), and *Nippert* v. *Richmond,* 327 U. S. 416 (1945). All five cases, of course, were concerned solely with *license* fees or a *privilege* tax required or imposed in order to engage in commerce, clearly violative of the Commerce Clause under their circumstances. The reliance upon the later case of *Halliburton Oil Well Co.* v. *Reily, supra,* 373 U. S. 64, is similarly misplaced, as noted above, because that case, too, is not in point. There the state tax was found to be a discrimination against a competitive taxpayer and, therefore, against interstate commerce because it treated the foreign taxpayer therein differently and unfairly from the domestic taxpayer in the imposition of the sales and use taxes upon like equipment and with tax exemptions to the domestic taxpayer which were denied to the out-of-state taxpayer.

Similarly inapplicable are the cases of *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U. S. 389 (1952), and *Miller Brothers Co.* v. *Maryland,* 347 U.S. 340 (1954), since in the former a privilege tax upon an out-of-state vendor for soliciting orders was held void, and in the latter, a use tax upon the mere possession of goods in transit was held void upon an out-of-state vendor who was not within the taxing jurisdiction.

Even more remote to the present issue are appellants' citations dealing with the State's various regulatory efforts over the milk industry and its prices involved in *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U. S. 511 (1935); *H. P. Hood & Sons* v. *DuMond,* 336 U. S. 525 (1949); *Dean Milk Co.* v. *Madison,* 340 U. S. 349 (1951); and *Polar Ice Cream & Creamery Co.* v. *Andrews,* 375 U. S. 361 (1964); or the



regulation of the packaging of in-state farm products destined for interstate shipment in *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137 (1970), or the regulation of the interstate shipment of shrimp or oysters in *Foster-Fountain Packaging Co.* v. *Haydel,* 278 U. S. 1 (1928) and in *Johnson* v. *Haydel,* 278 U. S. 16 (1928), respectively.

In the milk cases, *supra,* denial of licenses to out-of-state producers were held to be unconstitutional as unjustifiable discrimination against interstate commerce in the cases of *H.P. Hood & Sons* and *Dean Milk*; in the *Polar Ice Cream* case, a state statute and regulations requiring a milk distributor to purchase its milk supply from area producers at a fixed price and to take all milk offered were held unconstitutional under the commerce clause, since they interferred with the distributor's purchases from out-of-state producers. In the *Foster Fountain* and *Johnson* cases, *supra,* state statutes which sought to regulate the shipment of shrimp and oysters were held invalid, since these products by those taking them were immediately entitled to be shipped in interstate commerce. Clearly these are not the circumstances here, and the statute involved makes no attempt to frustrate interstate commerce nor impose any unconstitutional burden on such commerce.

## CONCLUSION

**The order and judgment of the New York Court of Appeals should be affirmed, in all respects, and Tax Law, § 270-a be declared constitutional under the commerce clause.**

Dated: June 7, 1976

Respectfully submitted,

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## APPENDIX A

**Laws of 1968, ch. 827:**

**"§ 10. If any section of this act, or the repeal, amendment, or change made by any such section to any item, clause, sentence, sub-paragraph, paragraph, subdivision, section or other part of article twelve of the tax law, or the application thereof to any person or circumstances, shall be held to be invalid, such holding shall not affect, impair or invalidate the remainder of this act or any other item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, or the application of such section of this act or such section or part of a section of such article twelve of the tax law held invalid, to any other person or circumstances, but shall be confined in its operation to the section of this act or the item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, directly involved in such holding, or to the person and circumstances therein involved.**

**§ 11. In the event that section four of this act or subdivision one or two of section two hundred seventy-a of the tax law as added thereto by such section four, shall be held to be invalid by reason of unconstitutionality, whether federal or state, then in either of such events, in the case of such subdivision one, the rates of tax provided by section two hundred seventy of the tax law, as amended by this act, shall be deemed to have applied and shall apply to resident individuals and nonresident individuals alike, and in the case of such subdivision two, the rates of tax provided for by section two hundred seventy of the**

tax law as amended by this act shall be deemed to have applied and shall apply to all transactions subject to the tax imposed by article twelve of the tax law, without any limitations as to the maximum amounts of tax due on any such transactions.

§ 12. If any provision of this act or of the sections of the tax law amended by this act, is inconsistent with, in conflict with, or contrary to any other provision of law, such provision of this act or section of such tax law shall prevail over such other provision and such other provision shall be deemed to have been amended, superseded or repealed to the extent of such inconsistency, conflict or contrariety.

## APPENDIX B

### Opinion of Counsel of the New York State Department of Taxation and Finance

"STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

September 1, 1970

"Best, Counsel.—Chapter 827 of the Laws of 1968 amended the stock transfer tax imposed by Article 12 of the Tax Law by adding to it a new section 270-a to make two basic changes in the stock transfer tax. First, it provides a lower rate of tax on sales made in New York State by a nonresident, and, second, it provides a maximum limit on the amount of tax on



any single sale made in the State by either a resident or a nonresident. In each of these instances, the basic requirement is that the sale of the stocks must be made in the State of New York.

"Where a sale of stocks by a nonresident is made outside of the State of New York, any agreement to sell, any memorandum or contract to sell, any delivery, and any record of transfer on the books of the corporation or its transfer agent made in the State of New York subjects the transaction to the stock transfer tax at the rates prescribed in subdivision 2 of section 270 of the Tax Law.

"Following are two examples of illustrative situations:

"(1) X, a nonresident of the State of New York (as defined in paragraph (b) of subdivision 1 of section 270-a), sells shares of stocks through his broker on a securities exchange located outside of the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stock to the name of the purchaser. The record transfer of the shares made by the transfer agent in New York State is subject to the rate of tax prescribed by subdivision 2 of section 270 of the Tax Law, rather than the lower tax prescribed by paragraph (a) of subdivision 1 of section 270-a as the sale was not made in the State of New York.

"(2) X, a nonresident of the State of New York, sells shares of stocks through his broker on a

securities exchange located in the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. The sale of the stocks having been made in the State of New York by a nonresident the lower rate of tax prescribed by section 270-a is applicable.

With respect to the maximum limit on the amount of tax on a single sale (as defined in subdivision 2 of section 270-a), the maximum limit applies only if the sale is made in the State of New York.

"Following are two examples of illustrative situations:

"(3) X orders his broker to sell 100,000 shares of stock of the same class of Y Corporation. The broker either on the same day or on a later day makes a sale of these shares to a single purchaser on a securities exchange located outside the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. As the sale of the stock was made on a securities exchange located outside the State of New York, the sale of these shares was made outside the State of New York, and the transfer to be made by the transfer agent in the State of New York is subject to the rate of tax prescribed by subdivision 2 of section 270 of the Tax Law.

"(4) X orders his broker to sell 500,000 shares of stock of the same class of Y Corporation. The



broker, who is a member of a securities exchange located in the State of New York on the same day or on a later day sells on such exchange 250,000 shares to one purchaser, and 250,000 shares to another purchaser. Both sales are made on the same day. As both sales in this example fall within the definition of a single taxable, sale, as defined in subdivision 2 of section 270-a, and as both sales were made on a securities exchange located in the State of New York, the sales were made in the State of New York, and the maximum limit on the amount of tax as prescribed in subdivision 2 of section 270-a applies.

"The maximum limit on the amount of tax on a single taxable sale applies to a sale made within the State of New York by either a resident or nonresident.

"The sole purpose of this opinion is to emphasize that the provisions of section 270-a of the Tax Law are applicable only where the sale of stocks is made in the State of New York. It is not intended to be an opinion of Counsel as to the definition of a single taxable sale."

## APPENDIX C

### Opinion of Counsel of the New York State Department of Taxation and Finance

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
DECEMBER 1, 1975

Peter Crotty, Counsel.—Inquiries have been received regarding the application of the Securities Acts Amendments of 1975, Public Law 94-29, to the administration of the New York stock transfer tax.

Section 21 of the new Federal law adds a new section 28(d) to the Securities Exchange Act of 1934. This act provides, in part, as follows:

> "(d) No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision . . ."



The Stock Transfer Tax Regulations provide that a transfer of record ownership on the books of a corporation within the State is subject to the stock transfer tax (20 NYCRR 440.2). However, in view of the Federal law, where the sole event in New York State is the delivery or transfer to or by a "registered clearing agency" or a "registered transfer agent", as those terms are defined under the Securities Exchange Act of 1934, there is no stock transfer tax due and owing on and after December 1, 1975. However, where a sale, agreement to sell, memorandum of sale or any other delivery or transfer takes place in New York State, the stock transfer tax due and owing thereon must be paid.

Transfer agents may accept a certification in the following form when certificates of stock are presented for transfer in New York and the sole event in the State is the delivery or transfer by a registered transfer agent:

> "It is hereby certified that the delivery and transfer of the attached certificate is not subject to the New York stock transfer tax under section 28(d) of the Securities Exchange Act of 1934 and no transaction subject to tax has occurred."

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .
(Firm name)

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .
(Authorized Signature and title)

*Appendix C—Opinion of Counsel of New York State Department of Taxation and Finance.*

As to parties who are not qualified to use the form of exemption certification under section 593.3(a) of the Regulations on the New York City Tax on Sale and Purchase of Certificates of Indebtedness, the words "New York City bond transfer tax" may be substituted for or added to the words "New York stock transfer tax" in the above certification.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1019

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, and PBW STOCK EXCHANGE, INC.,

*Plaintiffs-Appellants*

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

*Defendants-Appellees*

ON APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

## REPLY BRIEF FOR THE APPELLANTS

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**BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, and PBW STOCK EXCHANGE, INC.,**

*Plaintiffs-Appellants*

**v.**

**STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,**

*Defendants-Appellees*

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ON APPEAL FROM THE STATE OF NEW YORK COURT OF APPEALS

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## REPLY BRIEF FOR THE APPELLANTS

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### I. REPLY TO DEFENDANTS' STATEMENT OF THE CASE

**A. Defendants' Misstatement of the Question Presented**

**Defendants assert that section 270-a does no more than impose a tax on certain sales made within New York State. From this premise they argue that the only question presented by plaintiffs' challenge of section 270-a is the constitutionality of New York's establishing (1) a lower tax**

on sales by non-residents than by residents, and (2) a maximum tax on sales by anyone. Defendants' Brief at 2. Defendants' analysis, however, is based on a false premise.

Section 270-a does not impose a tax on sales; indeed it does not impose a tax on anything. Rather, the section effects a reduction in the rate of tax assessed against certain types of transactions otherwise subject to tax, *viz.*, transactions involving in-state sales by non-residents and in-state sales of large blocks of securities by anyone. The question presented in this case, therefore, is not whether New York has jurisdiction to tax sales of securities occurring in New York—it clearly can and plaintiffs have never suggested it cannot[1]—but whether the taxation of transactions involving in-state sales at the lower tax rates specified in section 270-a discriminates against interstate commerce when identical transactions involving out-of-state sales are taxed at a higher rate. In light of defendants' mischaracterization of the tax, a somewhat more detailed explanation of the operation of the tax than is contained in plaintiffs' brief may serve to highlight its discriminatory impact and sharpen the constitutional issue presented.

The only section of New York's "Tax on Transfers of Stock and Other Corporate Certificates", New York Tax Law, art. 12 (McKinney 1966, as amended), that imposes

[1] Defendants' frequent assertions of a "sufficient local nexus" to sustain the transfer tax, Defendants' Brief at 2, 14, 16, and 17, further reveal their misunderstanding of the issue presented. Plaintiffs do not challenge New York's power to tax sales, transfers, or deliveries that occur in New York. What they do challenge is New York's right under the commerce clause to structure the rates of taxation assessed against those events for the purpose and with the effect of discriminating against out-of-state stock exchanges in their competition with in-state stock exchanges.



a tax is section 270.1.[2] That section imposes a tax on all sales, agreements to sell, memoranda of sales, deliveries, and transfers of securities. The occurrence of any one of those events in New York State creates what defendants' own Rules and Regulations refer to as a "taxable transaction." *See, e.g.*, Rules and Regulations of the State of New York, tit. 20, §§ 440.1(i) and 447.1(a)(1962, as amended); 2 CCH *State Tax Rep., N.Y.* ¶¶ 57-102 and 57-104—57-130. For purposes of determining the amount of tax due, the taxable transaction looked at as a whole, not the separate events that it comprises, is the relevant unit.[3] As the Rules and Regulations state:

> "The fact that two or more of the taxable events . . . occur within the State of New York with respect to a single transaction does not mean that more than

[2] "There is hereby imposed and shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock, or certificates of rights to stock, or certificates of interest in property or accumulations, or certificates of deposit representing certificates taxable under this article, in any domestic or foreign association, company or corporation, or certificates of interest in business conducted by a trustee or trustees, made after the first day of June, nineteen hundred five, whether made upon or shown by the books of the association, company, corporation, or trustee, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final, and whether investing the holder with the beneficial interest in or legal title to said stock, or other certificates taxable hereunder, or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any such stock, or certificates." New York Tax Law § 270.1 (McKinney Supp.).

[3] Thus, defendants are incorrect when they assert, "The sole question is the constitutionality of the tax as applied in New York to transactions occurring there and nowhere else." Defendants' Brief at 20. Taxable transactions may involve events such as sales, occurring outside of New York. *See, e.g.*, Rules and Regulations, tit. 20 § 440.1; 2 CCH *State Tax Rep., N.Y.* ¶¶ 57-102—57-130. Indeed, section 270.2 prescribes different rates of tax for taxable transactions depending upon whether they involve a sale, regardless of whether the sale occurs in-state or out-of-state. *See* note 4, *infra*.

one tax is imposed; only one tax is payable with respect to any one transaction. Thus, if a sale, delivery of the certificates and record transfer to the name of the purchaser are all made within the State, only one tax is payable. However, if any one of these taxable events occurs within the State with reference to any transaction, it is subject to tax regardless of where the others occurred. Thus, a transfer of record ownership on the books of the corporation within the State is subject to tax, even though the sale and delivery of certificates were made outside the State. The same is true of a sale or agreement to sell, or a delivery of certificates made within the State, although all other events relating to the same transaction occurred without the State." Rules and Regulations, tit. 20, § 440.2; 2 CCH *State Tax Rep., N.Y.*, ¶ 57-102c.

The rate of tax to be assessed against any particular taxable transaction is prescribed by either section 270.2 or section 270-a[4]. Section 270.2 applies to all taxable transactions other than those specifically described in section 270-a, *i.e.*, in-state sales by non-residents and in-state block sales by residents and non-residents. Accordingly, regardless of whatever other characteristics may be present, a taxable transaction by a non-resident or one involving a block of stock is subject to the higher rate of tax in section 270.2 if there is an out-of-state sale and to the lower rate of tax in section 270-a if there is an in-state sale.

The discriminatory operation of the alternative rates of tax in section 270.2 and section 270-a is clearly explained by defendants' own tax counsel in an opinion which defandants reprint as Appendix B to their brief. The opinion illustrates the different taxation of identical transactions by non-residents with the following examples:

"(1) X, a nonresident of the State of New York (as defined in paragraph (b) of subdivision 1 of section 270-a), sells shares of stocks through his broker on a securities exchange located outside of the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stock to the name of the purchaser. The record transfer of the shares made by the transfer agent in New York State is subject to the rate of tax prescribed by subdivision 2 of section 270 of the Tax Law, rather than the lower tax prescribed by paragraph (a) of subdivision 1 of section 270-a *as the sale was not made in the State of New York.*

"(2) X, a nonresident of the State of New York, sells shares of stocks through his broker on a securities exchange located in the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. The sale of the stocks having been made *in the State of New York* by a nonresident

[4] Section 270.2 states:

"Except as otherwise provided by section two hundred seventy-a of this chapter, the tax imposed by this section shall be two and one-half cents for each share, except in cases where the shares or certificates are sold, in which cases the tax shall be at the rate of one and one-quarter cents for each share where the selling price is less than five dollars per share; two and one-half cents for each share where the selling price is five dollars or more per share and less than ten dollars per share; three and three-quarters cents for each share where the selling price is ten dollars or more per share and less than twenty dollars per share and five cents for each share where the selling price is twenty dollars or more per share." New York Tax Law § 270.2 (McKinney Supp.)

The flat two and one-half cents per share rate is imposed only on transactions not involving a sale, *e.g.*, a gift. Rules and Regulations of the State of New York, tit. 20, § 441.1(2) (1962, as amended); 2 CCH *State Tax Rep., N.Y.* ¶ 57-404. When a taxable transaction involves a sale (whether in-state or out-of-state), the rate of tax set by section 270.2 depends on the selling price. Rules and Regulations, tit. 20, § 440.1(1); 2 CCH *State Tax Rep., N.Y.* ¶ 57-404. The rate of tax set by section 270.2 is modified by the "non-resident discount" and "maximum tax" of section 270-a. (App. 14-21.) Rules and Regulations, tit. 20, § 441.2(a) and (f); 2 CCH *State Tax Rep., N.Y.*, ¶ 57-401c. A surcharge of 25% is imposed on the rate of tax prescribed by both section 270.2 and section 270-a. New York Tax Law § 270-d (McKinney Supp.)

the lower rate of tax prescribed by section 270-a is applicable." Defendants' Brief at 27-28 (emphasis added).

Absent the overlay of section 270-a, the tax scheme established by section 270.1 and section 270.2 would be unobjectionable under the commerce clause, *Hatch* v. *Reardon*, 204 U.S. 152 (1907), for it would impose equal tax burdens on all persons effecting taxable transactions with respect to the same number of securities at the same price. *See Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937). The effect of section 270-a, however, is to create alternative rates of tax, a higher and a lower, for identical taxable transactions keyed solely to whether the sales involved in those transactions occurred inside or outside of New York.[5] These alternative tax rates were designed to, and do in fact, place plaintiffs at a significant disadvantage in their competition with stock exchanges located in New York. The question presented in this case, therefore, is whether New York can structure its tax on securities transactions for the purpose and with the effect of discriminating against out-of-state businesses.

**B. Defendants' Misstatement of the Impact of Section 28(d) of the Securities Exchange Act of 1934.**

On page 4 of their brief, plaintiffs state:

> "Thus a person transferring or delivering securities in New York pursuant to an out-of-state sale now [*i.e.*, by reason of section 270-a] pays a higher tax in many circumstances than one transferring or delivering the same securities pursuant to an in-state sale."

[5] Footnote 9 in plaintiffs' brief discussing the graph on page 9 is not "incorrect" as defendants assert, Defendants' Brief at 9, but a precise description of the operation of section 270-a in the circumstances not represented on the graph. To change the footnote as defendants suggest would misstate the operations of the non-resident discount. New York Tax Law § 270-a.1 (McKinney Supp.).



Defendants claim that this statement "no longer holds true" but is "now moot and is no longer involved . . . ." Defendants' Brief at 8. Defendants thus concede that the statement used to be true, but assert that it is now "inaccurate" because of the addition of section 28(d) to the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(d) [hereinafter cited as section 28(d)] by the Securities Acts Amendments of 1975, Pub.L.No. 94-29 (June 4, 1975).

Defendants' attempt to use section 28(d) to blunt the discriminatory operation of section 270-a is misguided. Section 28(d) merely removes New York's power to tax:

> ". . . any [1] change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent . . . or . . . [2] delivery or transfer of securities to or through or receipt from such agency or agent . . . ."

In all other respects, New York's transfer tax, including section 270-a, remains as it was before the enactment of Pub.L.No. 94-29 (June 4, 1975). Therefore, as counsel to the New York State Department of Taxation and Finance recognizes in reference to section 28(d), ". . . where a sale, agreement to sell, memorandum of sale or *any other delivery or transfer* takes place in New York State, the stock transfer tax due and owing thereon must be paid." Quoted in Defendants' Brief at 9 (emphasis added).

Thus, according to defendants' own tax counsel, taking full account of section 28(d), a person transferring or delivering securities in New York pursuant to an out-of-state sale pays a higher tax in many circumstances than one transferring or delivering the same securities in New York pursuant to an in-state sale. Examples of such circumstances include the following:

1. Many institutional investors domiciled in New York chose, for reasons of policy or to minimize legal liability, to take possession of all securities they own. *Cf.* New York State Insurance Department Circular Letter No. 1 (1975). With respect to such investors, a tax will be imposed each time they purchase securities irrespective of whether the transfer is effected through a registered transfer agent or registered clearing agency. Significantly, however, if a block of stock is purchased out-of-state the tax will be higher (*i.e.*, calculated in accordance with section 270.2) than it will be if the same block is purchased in-state (*i.e.*, the tax will be calculated in accordance with section 270-a).

2. Any time a non-resident sells to a resident and the resident takes delivery in New York, the rate of tax assessed against the transaction will depend on the place of sale: a higher rate for an out-of-state sale and a lower rate for an in-state sale. This result is unaffected by any role that may be played in the transaction by a registered transfer agent or registered clearing agency.

3. For a block transaction or a transaction involving a sale by a non-resident, if transfer occurs in New York through someone other than a registered transfer agent or registered clearing agency, *see* Securities Exchange Act of 1934, § 17A(c)(1), 15 U.S.C. § 78q-1(c)(1), the place of sale will determine whether the higher or lower tax rate is assessed against the transaction.

Defendants state that "... the significance of [section 28(d)] to the issue involved is overlooked and incomplete." Defendants' Brief at 10. But the significance of section 28(d) was discussed fully by plaintiffs in the first document they filed in this Court, (Appendix G to Jurisdictional Statement) and defendants fail to mention a single respect in which plaintiffs' discussion of section 28(d) is incomplete. Clearly section 28(d) limits the application of New York's transfer tax in certain situations, but this limitation affects



neither the constitutional issue raised in this case nor this Court's jurisdiction.

## II. REPLY TO DEFENDANTS' ARGUMENT

### A. The Protection of New York State's "Economic Interests" Is Not a Justification for Discriminating Against Interstate Commerce.

Defendants argue that section 270-a is constitutional because its purpose is "to protect [New York's] economic interests, [New York's] public revenue, a major [New York] industry, and the economic welfare of [New York's] citizens dependent thereon." Defendants' Brief at 10. This bald acknowledgment of discrimination against interstate commerce in favor of parochial state interests is a confession of the statute's constitutional invalidity. *See* cases cited and discussed in Plaintiffs' Brief at 11-15.[6]

This Court stated last term:

> "[It is] well established by the history of the Commerce Clause, that this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes* v. *Alexandria Scrap Corporation*, No. 74-1607 (June 24, 1976).[7]

*See also, Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell*, 424 U.S. 366 (1976). New York's attempt to use section 270-a to "... minimize the competitive problems for New York securities markets ..." (App. 27.) is an effort to turn this nation's "common market" for securities transactions

[6] Defendants' attempt to distinguish plaintiffs' authorities is merely a repetition of the arguments in their Motion to Dismiss. The inaptness of defendants' arguments is discussed in Plaintiffs' Brief in Opposition to Motion to Dismiss at 4-5.

[7] Unlike *Hughes*, this case involves no "... commerce which owes its existence to a state subsidy program." Stevens, J. concurring.

into a series ". . . of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 356 (1951).

Defendants' reliance on the legislative objectives of the Securities Acts Amendments of 1975, Pub.L.No. 94-29 (June 4, 1975) (the "1975 Amendments") to justify section 270-a is misplaced. *See* Defendants' Brief at 10-12. It is one thing for the nation as a whole to attempt to strengthen its securities markets ". . . to assure that the country maintains a strong, effective and efficient capital raising and capital allocating system in the years ahead." Conference Report, Securities Acts Amendments of 1975, H.R.Rep.No. 94-29, 94th Cong., 1st Sess. 91 (1975). It is quite another for New York to attempt to ". . . provide long-term relief from some of the competitive pressures [on New York exchanges] from outside the State." Governor's Memorandum on Approval of section 270-a (App. 24). The latter effort is inconsistent with the former for its success would ". . . place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." *Guy* v. *Baltimore,* 100 U.S. 434, 442 (1880).

The 1975 Amendments seek ". . . to enhance competition and to allow economic forces, interacting within a fair regulatory field, to arrive at appropriate variations in practices and services." S.Rep.No. 94-75, 94th Cong., 1st Sess. 8 (1975). Section 270-a seeks to restrain competition between New York exchanges and out-of-state exchanges.[8] Thus,

[8] Relief from national competition was the most prevalent theme in the legislative history of section 270-a. The Governor observed that "competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State", and noted, "[t]he development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business" (App. 23-24); the President of the New York



rather than New York's legislative objectives being "no different from those national objectives which Congress recognize [*sic*] with the enactment of [the 1975 Amendments]", Defendants' Brief at 10, those objectives are in direct conflict with the federal objectives—and with the clear purpose of the commerce clause:

> "[A] state consistently with the commerce clause cannot put a barrier around its borders to bar out trade from other states and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce with foreign Nations, and among the several States . . . .' Nor may the prohibition be accomplished in the guise of taxation which produces the excluding or discriminatory effect." *Nippert* v. *City of Richmond,* 327 U.S. 416, 425 (1946).

At the heart of the commerce clause is a prohibition against a state using its taxing power to protect local businesses from competition from businesses in other states of the United States. To enforce this prohibition, the Court has "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could be more efficiently performed elsewhere. Even where the state is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 145 (1970). Here New York is requiring, through economic coercion, that securities be sold in New York though better or equal prices are available elsewhere. There is no legitimate interest at stake, only New York's bald attempt to protect its local securities industry from

Stock Exchange expressed concern regarding ". . . increasing competitive problems in recent years from regional stock exchanges located in San Francisco, Los Angeles, Chicago, Detroit, Philadelphia and Boston" (App. 26); and the legislature acknowledged that it was reacting to what it characterized as ". . . the diversion of business to those [out-of-state] exchanges" (App. 14).

pressures of interstate competition. The commerce clause clearly prohibits such action.

**B. Section 270-a Is Not "In Favor" of Interstate Commerce.**

The defendants argue in their brief, as they did in their Motion to Dismiss, that section 270-a is constitutional because it is designed "in *favor* of [interstate commerce] by encouraging the occurrence of stock transactions involving non-residents in the State of New York." Defendants' Brief at 16.[9] There is no question that section 270-a "encourages" non-residents to trade securities in New York—that is one of the reasons for this law suit. But rather than doing so in a manner "in favor of interstate commerce", it does so by discriminatory taxation of transactions involving out-of-state sales.

Everything else being equal, if New York imposes a tax on sales of securities, an investor will be "discouraged", or have a disincentive, from selling securities in the state. This disincentive to trade in New York because of the transfer tax is referred to by the New York Court of Appeals and defendants as plaintiffs' "position of economic superiority" under the transfer tax as it operated prior to the enactment of section 270-a. (App. 34; Defendants' Brief at 19.) Whether the transfer tax is viewed as a disincentive to trade in New York or an economic advantage for exchanges in other states, New York could eliminate the "disincentive" or "economic advantage" by simply eliminating the tax. So long as the tax remains, however, the commerce clause prohibits New York from imposing restrictions on

[9] Defendants do not suggest that the maximum tax provision as it affects New York residents is "in favor of" interstate commerce. Quite the contrary is the case, of course, for section 270-a operates to make it more expensive for a resident to sell a block of securities out-of-state than in-state. Plaintiff's Brief at 17-23.



interstate commerce designed to "neutralize" the "economic advantages" the tax confers on out-of-state exchanges. *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 528 (1935); Plaintiffs' Brief at 20-23.

The "encouragement" section 270-a provides for non-residents to sell securities in New York has nothing to do with favoring interstate commerce. The out-of-state investor who is "encouraged" to trade in New York is already "in" New York because of the transfer or delivery element of his transaction. Through section 270-a, the State of New York, in effect, says to such an investor, "You are going to be taxed regardless of where you sell, but if you choose to sell any place but here, we will tax you at least twice as much as we would otherwise." Such "encouragement" is no more constitutional here than it was in *Halliburton Oil Well Co.* v. *Reily,* 373 U.S. 64 (1963) (out-of-state manufacturers "encouraged" to locate manufacturing plants in Louisiana to obtain lower tax rates); or in *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951) (out-of-state milk bottlers "encouraged" to bottle milk in Wisconsin in order to sell to Wisconsin residents); or in *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928) (Mississippi corporation "encouraged" to perform certain operations in Louisiana in order to ship shrimp out of Louisiana); or in *Memphis Steam Laundry Cleaner* v. *Stone,* 342 U.S. 389 (1952) (out-of-state laundries "encouraged" to locate in Mississippi in order to avoid a tax on non-Mississippi laundries soliciting business in Mississippi).

The difference between New York's former tax scheme, which plaintiffs do not challenge and which this Court has found to be consistent with the commerce clause, and that scheme as modified by section 270-a is that under the former "[e]quality is the theme that runs through all the sections of the statute." *Henneford* v. *Silas Mason Co.,* 300

U.S. 577, 583 (1937). The former tax scheme charged the same rate for all taxable transactions involving the same number of securities with the same price. That equality of treatment is missing under section 270-a, for identical transactions are now subject to different rates of tax depending upon whether the sales occur inside or outside of New York State. This discriminatory tax treatment may "encourage" non-residents to sell in New York, but precisely because it does so, it also contravenes the commerce clause.

## CONCLUSION

For the reasons stated in this Reply Brief and in plaintiffs' initial Brief the judgment of the New York Court of Appeals should be reversed and section 270-a of the New York Tax Law declared unconstitutional.

Respectfully submitted,

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